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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-157

PETER P. LIEBERT, III,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	6
STATEMENT OF THE CASE	7
1. Procedural History Before the District Court	7
2. The Opinion and Judgment of the Court of Appeals	11
REASONS FOR GRANTING THE WRIT	15
I. The Court Below Ignored Controlling Decisions of This Court and Deprived Petitioner of His Fifth Amendment Right to Due Process of Law and His Sixth Amendment Rights of Confrontation and Cross-Examination of Government's Witnesses	15
II. In Balancing Away the Accused's Constitutional Right to Due Process of Law and His Fundamental Rights of Confrontation and Cross-Examination in Favor of a Non-Existent Interest of the Public "To Be Let Alone", the Court of Appeals Has Destroyed a Constitutional Priority Which Should Be Definitively Re-Established by This Court	19
III. This Court Should Settle an Important Issue, Upon Which the Circuits Are Split, Concerning Public Access to Information in the Possession of the Government Which Is Also Central to Discovery Procedures in Federal Criminal Prosecutions	22
IV. Conclusion	27

INDEX (Continued).

Page

APPENDIX A—Order of the Court of Appeals Granting Motion for Stay Pending Application for a Writ of Certiorari ... A1

APPENDIX B—Judgment of the Court of Appeals A2

APPENDIX C—Opinion of the Court of Appeals A3

APPENDIX D—The Order of the District Court Dismissing the Information A20

APPENDIX E—The Order of the District Court Denying the Government's Motion for Reconsideration and Compelling the Production of Computer Lists of Non-Filers A21

APPENDIX F—The Opinion of the District Court per Chief Judge Joseph S. Lord, III A22

APPENDIX G—Motion to Dismiss A31

APPENDIX H—The Order of the District Court Granting Motion for Discovery A33

APPENDIX I—Motion for Discovery A34

APPENDIX J—Information A38

APPENDIX K:

5th Amendment, United States Constitution A41

6th Amendment, United States Constitution A41

Rule 16(b), Federal Rules of Criminal Procedure A41

5 U. S. C. § 552 ..... A42

26 U. S. C. § 6103(a) A43

26 U. S. C. § 6103(f) A43

26 C. F. R. 301.6103(a)3(i)(a)&(b) A44

TABLE OF CASES CITED.

Page

Application of Radio Corporation of America, 13 F. R. D. 167 (S. D. N. Y. 1952) 19

Brady v. Maryland, 373 U. S. 83 (1963) 3, 4, 15, 26

Dennis v. United States, 384 U. S. 855 (1966) 18, 20

Davis v. Alaska, 415 U. S. 308 (1974) 2, 16

Getman v. National Labor Relations Board, 450 F. 2d 670 (D. C. Cir. 1971), stay denied 404 U. S. 1204 (1971) 22, 23, 25

Jencks v. United States, 353 U. S. 1007 (1957) 16

Jencks v. United States, 363 U. S. 657 (1957) 20

Nixon v. Sirica, 487 F. 2d 700 (D. C. Cir. 1973) 19

Pointer v. Texas, 380 U. S. 400 (1964) 2, 16

Robles v. Environmental Protection Agency, 484 F. 2d 843 (4th Cir. 1973) 24, 25

Rose v. Department of Air Force, 495 F. 2d 261 (2d Cir. 1974) cert. granted 43 U. S. L. W. 3445 (Feb. 18, 1975) 25

Roviaro v. United States, 353 U. S. 53 (1957) 16

United States v. Andolschek, 142 F. 2d 503 (2d Cir. 1944) .. 20

United States v. Coplon, 185 F. 2d 629 (1950) 15

United States v. Hughes, 413 F. 2d 1244 (5th Cir. 1969) 25

United States v. James W. Greenlee, Criminal No. 73-149 (E. D. Pa. 1974), see, 380 F. Supp. 652 (E. D. Pa. 1974), aff'd, No. 74-2106 (3d Cir. Opinion filed May 28, 1975), cert. pending, No. 75-151 ..... 8, 9

United States v. Jordan, 399 F. 2d 610 (2d Cir. 1968), cert. denied 393 U. S. 1005 (1968) 25

United States v. Liebert, 383 F. Supp. 1060 (E. D. Pa. 1974) 1

United States v. Nixon, 418 U. S. 683 (1974) 3, 17

United States v. Reynolds, 345 U. S. 1 (1953) 16, 21

United States v. Tanner, 279 F. Supp. 457 (D. C. Ill. 1967) ..25, 26

MISCELLANEOUS.

Page

Freedom of Information Act of Sept. 6, 1966, P. L. 89-554, 80 Stat. 383, as amended by the Act of June 5, 1967, § 1, P. L. 90-23, 81 Stat. 854, 5 U. S. C. 552 .....6, 19, 21, 22

Federal Rules of Criminal Procedure, Rule 16(b) 1, 3, 5, 6, 12, 23, 25, 26

Internal Revenue Code of 1954:

Section 6103, 26 U. S. C. § 6103 .....22, 23

Section 6103(a), 26 U. S. C. § 6103(a), 79 Stat. 153 6

Section 6103(f), 26 U. S. C. § 6103(f), 80 Stat. 1109 4, 5, 6, 10, 13, 21, 23

United States Constitution:

Article III 19

Fifth Amendment 3, 6, 15, 18, 21, 23

Sixth Amendment 2, 4, 6, 12, 16, 18, 21, 23

26 C. F. R. § 301.6103(a) and (f) 6

26 U. S. C. 7203 ..... 2, 3

28 U. S. C. 1254(1) 2

IN THE

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OCTOBER TERM, 1975.

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No. .

—

PETER P. LIEBERT, III,

Petitioner,

v.

UNITED STATES OF AMERICA.

———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner Peter P. Liebert, III, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on June 30, 1975.

OPINIONS BELOW.

On October 22, 1974, Chief Judge Joseph S. Lord, III, of the United States District Court for the Eastern District of Pennsylvania, filed an Opinion ordering the Government to produce a reasonable sampling of computer lists pursuant to Petitioner's Motion for Discovery under Rule 16(b) of the Federal Rules of Criminal Procedure. *United States v. Liebert*, 383 F. Supp. 1060 (E. D. Pa. 1974). The Opinion and the Order of the Court, dated October 23, 1974, are printed at Appendices "E" and "F" hereto, *infra*, pp. A21 and A22 to A30. After the Government failed to

comply with the Order of the Court, Chief Judge Lord on November 20, 1974, dismissed the Information charging Petitioner with violation of 26 U. S. C. 7203. The Order is printed at Appendix "D" hereto, *infra*, p. A20. On June 30, 1975, the Court of Appeals for the Third Circuit reversed the Order of the District Court and remanded the case for trial. The Opinion and Judgment of the Court of Appeals are printed as Appendices "B" and "C" hereto, *infra*, pp. A2 and A3.

JURISDICTION.

The Court of Appeals entered Judgment reversing the District Court on June 30, 1975 (Appendix "B", p. A2). On July 18, 1975, the Court of Appeals granted by Order a Stay of Mandate until July 30, 1975 (Appendix "A", p. A1).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

The Sixth Amendment guarantees that "the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . [and] to have compulsory process for obtaining witnesses in his favor." This Court has held in *Davis v. Alaska*, 415 U. S. 308 (1974) and *Pointer v. Texas*, 380 U. S. 400 (1964), that included within this fundamental constitutional guarantee is the right to obtain access to exculpatory information in the possession and control of the Government necessary to challenge and impeach the credibility of Government witnesses, and has emphatically stated that "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in a

system depend on full disclosure of all the facts, within the framework of the rules of evidence." *United States v. Nixon*, 418 U. S. 683, 709 (1974). The same result is compelled by the Due Process Clause of the Fifth Amendment as elaborated in the Court's decision in *Brady v. Maryland*, 373 U. S. 83 (1963).

Petitioner was charged with wilful and knowing failure to file income tax returns for the years 1967 through 1969, in violation of 26 U. S. C. 7203. In a failure-to-file prosecution, the Government's proof consists primarily, not of the testimony of *live* witnesses, but rather of a computer print-out, stating that the Government's computer can locate no record of the taxpayer's return. The central issue in such cases, therefore, becomes the critical factual dispute over the credibility of the Government's computer records and the magnitude of the margin of error in the Government's processing of tax returns.

Recognizing its potentially decisive significance and Petitioner's obvious need therefor in order to elicit the identities of potential witnesses with which to prepare and present an adequate defense, the District Court, per Chief Judge Joseph S. Lord, granted Petitioner's pretrial discovery motion, pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure. The Order directed the Government to produce, subject to appropriate safeguards, a reasonable and *limited* sampling of the Government's computer-created list of alleged "non-filers". On the Government's refusal to obey this Order, the District Court dismissed the indictment.

A panel of the Court of Appeals for the Third Circuit acknowledged that the District Court was correct in its view (1) that production of such lists of alleged "non-filers" is barred by no statute or regulation, (2) that disclosure of such lists of alleged "non-filers" is expressly

authorized by Section 6103(f) of the Internal Revenue Code, and, (3) that such lists are "undoubtedly . . . material to the preparation of [Petitioner's] defense." Nevertheless, the Court below reversed and reinstated the information, holding that the District Court abused its discretion in determining that Petitioner's need, in the context of a criminal prosecution, for that list of potential witnesses outweighs a posited, legitimate interest, presently *not* being advanced by them or any of them, of unknown third parties–potential defense witnesses–in being "left alone" by those accused of crimes.

In this context, the questions presented are these:

1. Did not the Court of Appeals by denying petitioner access to the sole effective evidence by which the credibility of the Government's computer records can effectively be challenged deprive him of his right to confront and cross-examine witnesses as guaranteed by the Sixth Amendment to the United States Constitution?

2. Did not the Court of Appeals err in subordinating Petitioner's fundamental Due Process right to obtain potentially exculpatory evidence essential to the preparation of his defense of a criminal prosecution to a non-existent general privacy interest which is flatly negated by clear Congressional mandate in Section 6103(f) of the Internal Revenue Code, 26 U. S. C. § 6103(f)? Moreover, is not the Court of Appeals decision inconsistent with this Court's decision in *Brady v. Maryland*, 373 U. S. 83 (1963)? Furthermore, were not the potential third parties adequately protected in the District Court's order compelling production of a limited sample of the names of alleged "non-filers" by appropriate safeguards to insure that personal and confidential information would be deleted?

3. Did not the District Court properly exercise its discretion under F. R. Crim. P. 16(b) in ordering the Government, in this trial-by-computer, to produce the only effective evidence by which the accused can directly challenge the credibility of the Government's computer print-out, where it is conceded that Petitioner satisfied the requirement under Rule 16(b) by making the requisite "showing of materiality", and where the finding that Petitioner's request for such information was "reasonable" was based on a considered judgment that the Government's proffered "alternative means of securing the information" is a hollow, meaningless, and illusory substitute disclosing only theoretical rudiments of the Government's computer program?

4. In view of the clear statutory authority in Section 6103(f) of the Internal Revenue Code, 26 U. S. C. 6103(f), permitting any person to obtain from the Secretary of the Treasury Department or his delegate the names of alleged "non-filers" in a designated internal revenue district, did the Court of Appeals err in nullifying this express statutory authorization?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED.

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, which provide, in relevant part:

> FIFTH AMENDMENT.
>
> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .
>
> SIXTH AMENDMENT.
>
> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor . . . .

This case involves Section 6103(f) of the Internal Revenue Code of 1954, 26 U. S. C. § 6103(f), 80 Stat. 1109, which provides as follows:

> (f) The Secretary or his delegate shall, upon inquiry as to whether any person has filed an income tax return in a designated internal revenue district for a particular taxable year, furnish to the inquirer, in such manner as the Secretary or his delegate may determine, information showing that such person has, or has not, filed an income tax return in such district for such taxable year.

This case also involves Rule 16(b) of the Federal Rules of Criminal Procedure; Section 1 of the Freedom of Information Act, 5 U. S. C. 552, 80 Stat. 381; Section 6103(a) of the Internal Revenue Code of 1954, 26 U. S. C. § 6103(a), 79 Stat. 153; and 26 C. F. R. § 301.6103(a) and (f), which, together with the full text of the foregoing constitutional and statutory provisions, are set out in Appendix "K", *infra*, pp. A41 to A45.

STATEMENT OF THE CASE.

1. Procedural History Before the District Court.

On December 21, 1973, Petitioner, Peter P. Liebert, III, Esquire, a member of the Philadelphia Bar, was charged in a three-count Information with wilfully and knowingly failing to file tax returns for the calendar years 1967, 1968 and 1969. The Information is based upon a report by personnel of the Internal Revenue Service's Mid-Atlantic Service Center that the IRS computers were unable to locate the income tax returns filed by Petitioner for the years in question. At trial, the Government proposes to attempt to prove that Petitioner wilfully and knowingly failed to file the three returns in question by introducing into evidence certain computer data and print-outs.

Petitioner was arraigned and pleaded not guilty to all charges against him. Thereafter, Petitioner sought discovery from the Government for the preparation of his defense. Since the Government's only "witness" in this prosecution is an IRS computer, Petitioner exercised his constitutional rights to seek information within the exclusive control of the Government necessary to challenge the credibility and accuracy of the IRS Data Processing Center. Initially, Petitioner filed a Motion for Access to Buildings, Places, Tangible Objects and Documents, in order to identify the nature of the malfunctions and defects in the computer itself. On October 23, 1974, after extensive hearings and conferences on the propriety and scope of the motion, Chief Judge Lord granted Petitioner's Motion. No appeal has been taken from this Order and the Government has agreed to comply.[1]

1. During the course of the hearings held in connection with this Motion, both Government and proposed defense experts testified as to the inevitability of defects, deficiencies and malfunctions in any data processing system, including that of the Internal

On February 14, 1974, during the trial of another criminal tax prosecution for failure to file a return, *United States v. James W. Greenlee, Criminal* No. 73-149 (E. D. Pa. 1974), *see*, 380 F. Supp. 652 (E. D. Pa. 1974), *aff'd*, No. 74-2106 (3d Cir. Opinion filed May 28, 1975), *cert. pending*, No. 75-151, the Government called as a witness one Joseph P. Murphy, an IRS employee at the Mid-Atlantic Service Center, responsible for the monitoring and coordination of the IRS delinquency check programs. On February 18, 1974, a copy of one page from a list of "non-filers" for 1970 containing Greenlee's name was introduced into evidence by the Government as a part of its case-in-chief. Murphy testified that the complete register contained some 2800 pages, each having about 35 names, or containing a total of approximately 98,000 non-filers for the Mid-Atlantic Region.[2]

On the very next day, February 18, 1974, in the 24-hour period during which the defense in the *Greenlee* case had the benefit of having the single page of the list which the Government had introduced in evidence, counsel for Greenlee succeeded in locating and called as a voluntary witness one Charles L. Koff, whose name was among Greenlee's and others appearing on the page of the computer list introduced into evidence. Koff testified under oath at Greenlee's trial that *despite* the fact that his name appeared on the list of non-filers for 1970, he had, in fact,

1. (Cont'd.)
Revenue Service. One witness, Daniel Capozzoli, the Associate Director for the IRS Computer Centers, testified that the computer equipment *presently used* at the centers *incorporated* certain technical *improvements which were not in use during the years 1967 to 1969*, the years for which the IRS computer is unable to locate records of the returns filed by the Petitioner.

2. The register lists the names of those persons who received notices for the year in question that the IRS could locate no record of their filing of a tax return for the given year.

filed his tax return for the year in question and received a refund for that year.

Learning that the Government had successfully introduced and relied upon computer lists in the *Greenlee* case, Petitioner, on February 28, 1974, filed a Motion for Discovery seeking the production of the computer lists for the years 1967 to 1973, in order to test the reliability and credibility of the computer.[3]

In the Government's Answer to the Motion for Discovery, filed March 21, 1974, the Government raised no objection to the request on the ground of confidentiality or privacy but limited its objection to the question of materiality as to the request for any records "other than the three indictment years of 1967, 1968 and 1969."

In subsequent conferences before Chief Judge Lord, the Government indicated that a list of non-filers did not exist for the years 1967 to 1969, the years identified in the Information. The Government noted, however, that the system in 1967 to 1969 was essentially the same as in the more recent years although the accuracy and efficiency of the system had been improved since that time. Chief Judge Lord stated that the central issue in the case was the reliability of the computer; that the list of non-filers was "highly relevant information"; and that, if errors were disclosed in the computer lists for the years 1970 to 1973 after the system had been improved, "how much more likely . . . that that kind of mistake was made in '67, '68 or '69." (Conference Notes, 4-25-74, p. 101).

On May 16, 1974, the District Court ordered the Government to produce no later than May 23, 1974 lists for 1970 and 1971.

3. Unlike the Access Motion, the Motion for Discovery was directed at the production of evidence which could challenge the actual *results* of the computer system rather than the theoretical reliability of the computer.

After the deadline thus fixed, the Government filed a Motion for Reargument and for the first time stated that the Commissioner of Internal Revenue had "directed that his representative not deliver the information requested by the defendant." On May 28, 1974, Petitioner filed a Motion to Dismiss the Information, on the ground of the Government's failure to comply with the Order of May 16, 1974. On June 10, 1974, the Government filed a Supplemental Answer to the Motion for Discovery, which Petitioner had filed on February 28, 1974. The Government then raised therein the question of confidentiality pursuant to certain nondisclosure statutes.

After a hearing on the Motion for Reargument and the Motion to Dismiss, the District Court stayed the Discovery Order, granted the Motion for Reargument and requested additional briefs. On October 22, 1974, Chief Judge Lord filed an Opinion and Order denying the Government's Motion for Reconsideration and ordered the Government to produce by November 5, 1974, a "*mutually agreeable portion of the lists*" with all personal information, such as social security numbers, *deleted*. Finding no statutory authority for denying access to a *reasonable sampling* of the computer lists and concluding that the lists sought were highly relevant evidence, Chief Judge Lord held that the constitutional right of the taxpayer adequately to prepare his defense outweighed the "elusive" interest of unknown persons named on the lists in protection from the alleged "invasion of privacy" relied upon by the Government. Chief Judge Lord emphasized that this conclusion was further compelled by the fact that 26 U. S. C. 6103(f) expressly authorizes any person, upon inquiry of the Secretary, to learn whether any named person residing in a given tax district filed a tax return for a designated year.

After a further extension of time to November 19, 1975, granted upon the Government's request, within which to comply with the Discovery Order, the District Court was informed on November 20, 1974 by the Government that it would refuse to produce *any* names of non-filers, and that it would not even confer with defense counsel to arrive at a "mutually agreeable" portion of the list for production to the defendant. On November 26, 1974, after a hearing on a Rule to Show Cause, the District Court entered an Order dismissing the Information. From this Order the Government appealed to the United States Court of Appeals for the Third Circuit, at No. 74-2294.

2. The Opinion and Judgment of the Court of Appeals.

On June 30, 1974, a panel of the Court of Appeals for the Third Circuit reversed the judgment of the District Court. In its Opinion, written by Judge Rosenn, the Court of Appeals recognized that (A4):

> "In a failure-to-file prosecution, the Government relies heavily upon a report compiled by the personnel of the appropriate service center that their computers have no record of the receipt of a taxpayer's return for a particular year."

The Court of Appeals noted that the case presented a "complex and controversial" issue of *first impression* in that the Court had to determine the extent of pre-trial discovery available to a defendant in a federal criminal tax case where the evidence against him was to be the "testimony" of a computer print-out. The Court freely confessed its need for definitive guidance in this area and observed that the task of balancing petitioner's unquestionable rights to the information against what it con-

ceived to be the public interest was a "difficult and delicate task." (A17).

Significantly, the Court of Appeals agreed with the District Court that there was no statutory prohibition against the production of the computer lists and that the authority to order the production of such lists was governed by Rule 16(b) of the Federal Rules of Criminal Procedure. The Court further concluded that (A12, A13):

> "The non-filing lists *undoubtedly are material* to the preparation of Liebert's defense. A defendant in a criminal trial enjoys the Sixth Amendment right of being confronted with the witnesses testifying against him and of having compulsory process for obtaining witnesses to testify in his favor . . .
>
> "Included within the constitutional right of confrontation is the ability through cross-examination to challenge the credibility and reliability of the witnesses testifying against defendant . . . A major 'witness' confronting Liebert will be computer print-outs indicating that the IRS has no record of having received his returns . . . *The non-filing lists plainly are outputs of the computer system identifying individuals not filing returns. If an individual who in fact has filed is listed as a non-filer due to computer error, such error casts doubt on the accuracy and reliability of the records identifying Liebert as a non-filer.* The lists, therefore, may be useful to Liebert in his efforts to impeach the reliability of the computer procedures indicating that he has not filed his returns." (Emphasis supplied).

Despite the recognition by the Court of Appeals that Petitioner had a Sixth Amendment right to information which would discredit the accuracy and reliability of the

computer records ,the Court held that Chief Judge Lord's Order for Production of the computer lists constituted "an abuse of discretion."

In so determining, the Court of Appeals held that efforts of the Petitioner to communicate with the individuals listed as non-filers might lead to an invasion of the privacy of such persons and that "such contact could prove disturbing apart from tax considerations by reviving dormant unpleasant memories." (A15-A16). The Court subordinated Petitioner's constitutional rights to obtain critically significant evidence necessary to his preparation of an adequate defense to the posited invasion of privacy which Chief Judge Lord properly characterized as "at best, elusive." As Chief Judge Lord stated in his Opinion in the District Court: "As between the two [the competing interests of the public and the accused], the balance is heavily in favor of disclosure."

Moreover, the Court of Appeals appears to have reached its unusual conclusion in spite of the fact that an accused could generate the Government's list of alleged "non-filers" by submitting to the Secretary of the Treasurer, pursuant to 26 U. S. C. § 6103(f), a collection of all of the telephone directories and city directories for the internal revenue district in question and making an inquiry as to whether the individuals so identified had or had not filed tax returns, according to the Government's records, for the year in question. Under the plain language of § 6103(f), the Government, through the Secretary or his delegate, would be obliged to furnish the information requested.

The Court of Appeals disregarded the provision of adequate safeguards in the Order of the District Court, overlooked the limited scope of the Order, and grossly overstated the value of the Government's hollow and illusory "alternative means of securing the information" by

access to data, manuals and government experts. The more significant error, however, is that the Court of Appeals addressed itself only to the programming *techniques* and retrieval *methods* of the computer; it ignored the more basic step, the test of the actual *results*, without which Petitioner is unable to locate defense witnesses to rebut the computer's findings. Thus, the Court of Appeals erroneously reversed the Order of the District Court, and remanded the case for trial.

Petitioner filed a Motion for Stay of Mandate pending application to this Court for a Writ of Certiorari, which stay the Court of Appeals, by Order of July 18, 1975, granted until July 30, 1975.

REASONS FOR GRANTING THE WRIT.

I. The Court Below Ignored Controlling Decisions of This Court and Deprived Petitioner of His Fifth Amendment Right to Due Process of Law and His Sixth Amendment Rights of Confrontation and Cross-Examination of Government's Witnesses.

The Fifth Amendment guarantees that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." Inherent in that constitutional protection is the right of the accused to "evidence [which] is material either to guilt or to punishment," *Brady v. Maryland*, 373 U. S. 83, 87 (1963), which necessarily includes any evidence which would tend to exculpate the defendant in a criminal prosecution. The computer lists certainly fall within the category of that evidence which would by right be discoverable under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

The constitutional and procedural protections afforded the accused are even more firmly rooted in the principles expressed in the scholarly opinion of Judge Learned Hand in *United States v. Coplon*, 185 F. 2d 629 (1950), wherein the Court of Appeals for the Second Circuit held that a criminal defendant could not be prosecuted where the government chose to assert a privilege as to the very evidence which would be necessary to an adequate preparation for a defense. In *Coplon*, at 638, the Court stated:

> "We agree that there may be evidence—'state secrets'—to divulge which will imperil 'national security'; and which the Government cannot, and should not, be required to divulge . . . The immunity from disclosure of the names or statements of informers is an instance of the same doctrine. This privilege will

> often impose a grievous hardship, for it may deprive parties to civil actions, or even to criminal prosecutions of power to assert their rights or to defend themselves. That is a consequence of any evidentiary privilege. It is, however, one thing to allow the privileged person to suppress the evidence, and, toto coelo, another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses . . . [W]hen the Government chose to prosecute an individual for crime, it was not free to deny him the right to meet the case made against him by introducing relevant documents otherwise privileged . . . [T]he prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defence. To that we adhere."

This view has been consistently restated and reaffirmed by this Court and given constitutional effect, in an unbroken line of cases. See, *Roviaro v. United States,* 353 U. S. 53 (1957); *Jencks v. United States,* 353 U. S. 1007 (1957); *United States v. Reynolds,* 345 U. S. 1 (1953).

As fundamental to the rights guaranteed by the Due Process Clause are the rights of confrontation and cross-examination enjoyed by an accused by virtue of the Sixth Amendment. The Sixth Amendment guarantees that "the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . [and] to have compulsory process for obtaining witnesses in his favor." This Court has held that included within this fundamental constitutional guarantee is the right to obtain access to exculpatory information in the possession and control of the Government necessary to challenge and impeach the credibility of Government witnesses. *Davis v. Alaska,* 415 U. S. 308 (1974); *Pointer v. Texas,* 380 U. S. 400 (1964).

In the recent case of *United States v. Nixon,* 418 U. S. 683 (1974), this Court unequivocally adhered to the well-settled principle that there can be no absolute privilege, even when asserted by the Chief Executive, which may frustrate the legitimate needs of the judicial process in affording to an accused a fair opportunity to secure evidence necessary to meet a criminal prosecution against him. Recognizing the fact that presidential communications are "presumptively privileged", this Court nevertheless restated the ancient proposition of law that " 'the public . . . has a right to every man's evidence,' except for those persons protected by constitutional, common law or statutory privilege, *United States v. Bryan,* 339 U. S. 323, 331 (1950); *Branzburg v. Hayes,* 408 U. S. 665, 688 (1972)." 418 U. S. at 709. In view of an accused's clear constitutional right to obtain information necessary to an adequate defense, this Court has refused to extend any degree of deference to a *generalized* interest in confidentiality. The right to the production of all evidence at a criminal trial, on the other hand, has constitutional dimension. "It is the manifest duty of the courts to vindicate those [constitutional] guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced." 418 U. S. at 711.

In the matter before this Court, Petitioner seeks the production of a reasonable and limited sampling of computer lists, bearing the names and addresses of persons whom the IRS has notified and determined to be "non-filers" in the years 1970 and 1971. Both the District Court and the Court of Appeals concluded that these computer lists were highly relevant to the preparation of Petitioner's defense. The Court of Appeals, moreover, concurred in Chief Judge Lord's determination that such lists are not protected or barred from production by any existing non-

disclosure statutes or regulations. Neverthless, the Court of Appeals held that the generalized and ephemeral claim of confidentiality asserted by the Government (not on its own behalf but allegedly on behalf of those persons whose names appear on the lists, to avoid *possible* intrusions into their private lives) outweighed Petitioner's urgent and specific need for the information in preparation of a defense to criminal charges. In so doing, the Court of Appeals magnified a minor and elusive aspect of the public's "right to be let alone" to the point of overriding a critical right of constitutional status—the right of an accused to obtain any evidence relevant to the preparation of his defense. In weighing these competing interests, the Court of Appeals, in effect substituting its own judgment for that of the District Court, employed an improper standard of review of the District Court's Order, exceeded the proper bounds of its appellate jurisdiction and reached a result plainly inconsistent with the decisions of this Court.

The ruling of the District Court was entirely consistent with this Court's decision in *Dennis v. United States,* 384 U. S. 855 (1966) and its progeny, which have recognized in ever-expanding terms, "that disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice". It must be concluded by this Court that the Petitioner was entitled to the computer lists without which he is unable to locate and interview the potential defense witnesses by whose testimony, alone, Petitioner can demonstrate to a jury that the computer-generated evidence against him is not worthy of belief. To deny Petitioner access to such lists is nothing less than to deny him the very constitutional rights guaranteed to him by the Fifth and Sixth Amendments and to destroy the integrity of the fact-finding process in criminal prosecutions.

II. In Balancing Away the Accused's Constitutional Right to Due Process of Law and His Fundamental Rights of Confrontation and Cross-Examination in Favor of a Non-Existent Interest of the Public "To Be Let Alone", the Court of Appeals Has Destroyed a Constitutional Priority Which Should Be Definitively Re-Established by This Court.

By its holding, the Court of Appeals has given, not only legitimacy, but supremacy, to the mere invocation of a generalized privilege asserted by the Government in the protection of the public against what must be conceded to be a hypothetical, if not improbable, violation of the public's preference "to be let alone." As the United States Court of Appeals for the District of Columbia Circuit held in its en banc decision in *Nixon v. Sirica,* 487 F. 2d 700 (D. C. Cir. 1973), the recognition of such a generalized privilege, especially in criminal cases, would stultify the Judicial Power guaranteed by Article III of the Constitution and would render the Freedom of Information Act "nothing more than a legislative statement of unenforceable rights." The decision below destroys a balance of interests which has already struck by the framers of the Constitution and undermines an important aspect of the operation of the judicial system. As the lower court said in *Application of Radio Corporation of America,* 13 F. R. D. 167, 172 (S. D. N. Y. 1952):

> "Any witness who is subpoenaed suffers inconvenience. An individual operating a small business, for example, or a corporation operated by a sole shareholder, may suffer, in like circumstances, more inconvenience than [a major corporation] with . . . thousands of employees. But this inconvenience, whether suffered by witnesses, grand jurors, or jurors, is part

of the price we pay to secure . . . the enforcement of our laws." (Emphasis added)

The conclusion reached by the Court of Appeals for the Third Circuit in this case displays a marked insensitivity to the fundamental constitutional rights of a criminal defendant to the same relevant evidence which the government has utilized in the prosecution of other alleged federal tax violators. This Court held in *Dennis v. United States*, 384 U. S. 855, 870 (1966), that in our judicial system the defense should have access to the same "storehouse of relevant fact, which the prosecution avails itself and that departures from this principle are justifiable only by the clearest and most compelling considerations." As the District Court held, there are no such "clear and compelling considerations" in this case.

To permit the Government to assert the privilege and to withhold evidence from a defendant who is being prosecuted by the Government for alleged criminal offenses is deeply repugnant to settled notions of due process of law. As Mr. Justice Brennan stated in the landmark decision of *Jencks v. United States*, 363 U. S. 657, 671 (1957), "[E]ven though the government claimed a privilege to withhold certain reports of its witnesses based on its interest in safeguarding the privacy of its files, we hold that the criminal action must be dismissed when the government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and admission in evidence relevant statements or reports in the possession of government witnesses touching the subject matter of their testimony at the trial." Judge Learned Hand's statement on this subject in *United States v. Andolschek*, 142 F. 2d 503 (2d Cir. 1944), articulates a principle firmly rooted in our law:

> "So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them or it must expose them fully." 142 F. 2d at 506.

See also *United States v. Reynolds*, 345 U. S. 1, 12 (1953).[4] These holdings, that an indictment must be dismissed where the Government asserts a privilege in refusing to turn over relevant information to a criminal defendant, rest on fundamental, constitutional underpinnings. Both the Fifth and Sixth Amendments compel the dismissal of charges against an accused who is denied fair access to relevant exculpatory or impeachment evidence. The holdings in these cases, that even a claim of confidentiality of "state secrets" cannot outweigh and defeat an accused's right to prepare and present an adequate defense, *a fortiori* compel the same result in a case such as this, where the non-disclosure of relevant evidence is withheld, not upon an important and well-recognized privilege such as the privilege for state secrets, but on the novel and ephemeral basis of a claim by the Government of a *non-governmental* privilege against the invasion of privacy purportedly asserted on behalf of those persons whose names appear on the computer lists and who would be potentially exculpatory witnesses for the defense. The

4. The serious Fifth and Sixth Amendment issues squarely presented here are aggravated in this case by the direct applicability of the Freedom of Information Act, providing that "any person" is entitled to the documents involved herein, and the Internal Revenue Code, 26 U. S. C. 6103(f), which makes it mandatory for the Secretary to disclose, upon inquiry of any person, the identity of any non-filer in a designated internal revenue district for a particular taxable year.

attenuated claims asserted by the Government and adopted by the Court below plainly do not withstand constitutional scrutiny.

III. This Court Should Settle an Important Issue, Upon Which the Circuits Are Split, Concerning Public Access to Information in the Possession of the Government Which Is Also Central to Discovery Procedures in Federal Criminal Prosecutions.

Both the District Court and the Court of Appeals concluded that the computer lists lacked any inherent quality which would entitle them to confidential treatment. The District Court and the Court of Appeals also agreed that the Government's production of the lists is not barred under any existing non-disclosure statute or regulation. Despite the fact that the Government routinely uses computer lists of non-filers as affirmative evidence of guilt in failure-to-file cases, and, pursuant to 26 U. S .C. § 6103, *must disclose* the identity of any non-filer to anyone upon request, the Government asserts a claim of privilege in refusing to disclose even a reasonable and limited sampling of the names and addresses of non-filers in 1970 and 1971. Under the Freedom of Information Act of Sept. 6, 1966, P. L. 89-554, 80 Stat. 383, as amended by the Act of June 5, 1967, § 1, P. L. 90-23, 81 Stat. 854, 5 U. S. C. 552, an individual has the right to demand of the Government access to all records unless they are protected by one of nine specifically enumerated exceptions. The Court of Appeals held that the names and addresses derived from the computer lists did not fall within any of the exemptions recognized by non-disclosure provisions of any federal statute. As the Court stated in *Getman v. National Labor Relations Board*, 450 F. 2d 670 (D. C. Cir. 1971), *stay denied* 404 U. S. 1204 (1971):

> "The giving of names and addresses is a very much lower degree of disclosure; in themselves the bare name and address give no information about an individual which is embarrassing. In the conduct of appellee's study, any disclosure information more personal than a name and address is wholly consensual and within the control of the employee." 450 F. 2d at 675.

Factors which led the *Getman* Court to order the release of the names and addresses of certain individuals are equally applicable to the instant case. The nature and extent of any "invasion of privacy" entailed by the exigencies of preparing a defense to a criminal tax prosecution would be of minimal significance when contrasted with the gravity of the injustice of wrongful conviction and possible deprivation of liberty resulting from the denial of access to critical evidence within the exclusive control of the Government. In addition, under Section 6103(f) of the Internal Revenue Code, the identity of alleged "non-filers" is, by law, public information. 26 U. S. C. 6103(f).

Relying on a bizarre construction of Rule 16(b) of the Federal Rules of Criminal Procedure, the Court of Appeals concluded that, even though the computer lists are highly relevant to the preparation of a defense, Petitioner's request therefor was not "reasonable" and that in finding to the contrary the District Court had abused its discretion. The Court of Appeals relied primarily on two unexamined premises in arriving at this erroneous conclusion. First, it construed the term "reasonable" in Rule 16(b) as importing a balancing test, notwithstanding the presence of Fifth and Sixth Amendment claims to the information sought, and applying this test, held that the right of privacy of unknown potential defense witnesses not now before the Court outweighs the constitutional right of the

defendant presently before the Court to the computer lists which identify them. Secondly, the Court determined that alternative means of securing the information are available to the defendant which in the opinion of the Court of Appeals would provide him with some ability to understand the IRS computer which is the Government's lone witness against him.[5]

In sharp contrast with the holding of the Third Circuit in the instant case are the decisions of the Court of Appeals for the District of Columbia and the Fourth Circuit which have held that once it is determined the production of relevant evidence is not barred by the existence of applicable non-disclosure statutes, it is improper for the trial court to weigh the right to disclosure against possible "personal privacy" considerations that might flow from the disclosure of such evidence. *Robles*

5. The "alternative means" suggested by the Court of Appeals as a substitute for the computer lists are comprised of statistical data, operational manuals, tables and access to government computer experts for purposes of deposition. None of these "alternatives" would permit the defendant to test the *results* of the computer. While the substitute discovery would possibly permit the defendant to identify certain theoretical malfunctions and defects in the programming techniques and retrieval systems, it would not provide the accused with the effective ability to find *potentially favorable witnesses* who would be able to testify that they had filed tax returns in a given year, despite the appearance of their names on the computer lists of non-filers. The "alternative" is thus illusory because it relegates the accused to a complicated, theoretical presentation, via expert witnesses, which a jury consisting of twelve laymen will naturally have difficulty in understanding and which cannot show that mistakes actually do occur. The probative value of the lists, therefore, cannot be questioned. Where, as here, the computer is the "real witness" against the accused, the necessity for such information directly aimed at challenging the reliability of the computer "evidence" is self-evident. The alternative proffered by the Government, rejected by the District Court, but adopted by the Court of Appeals, is a hollow substitute for that to which Petitioner is constitutionally entitled.

v. Environmental Protection Agency, 484 F. 2d 843 (4th Cir. 1973); *Getman v. National Labor Relations Board, supra. Compare Rose v. Department of Air Force,* 495 F. 2d 261 (2d Cir. 1974) *cert. granted* 43 U. S. L. W. 3445 (Feb. 18, 1975). The reasoning which formed the bases of the decisions of these Circuits compelling disclosure in the foregoing *civil* cases would necessarily entail a like result in a *criminal* case such as this, where an accused's right to disclosure is of constitutional dimension.

Petitioner seeks the disclosure of evidence which the Court of Appeals found to be free of "any statutory prohibition against the production [thereof]" and which was "undoubtedly . . . material to the preparation of Liebert's defense." Unlike the Circuit Court decisions herein mentioned, Petitioner seeks the computer lists in preparation for a *criminal* trial. Having concluded that the first prong of the criteria for allowance of discovery under Rule 16(b) had been met, i.e., "materiality", it was clearly erroneous for the Court of Appeals to hold that Chief Judge Lord has abused his discretion, and to conclude that the request for discovery was not "reasonable".

Contrary to the holding of the Third Circuit in this case, the Court of Appeals for the Second Circuit has held that, within the meaning of Rule 16(b), a discovery request, where deemed to be relevant, may only be found not "reasonable" if the language in which the request is cast lacks specificity or is overly broad in its scope. *United States v. Jordan,* 399 F. 2d 610 (2d Cir. 1968), *cert. denied* 393 U. S. 1005 (1968). Various courts have cautioned that in order to safeguard the ability of a criminal defendant to prepare for trial, a necessarily lenient view must be taken to the granting of motions made under Rule 16(b). *United States v. Hughes,* 413 F. 2d 1244, 1254 (5th Cir. 1969); *United States v. Tanner,* 279 F. Supp.

457, 469 (D. C. Ill. 1967).[6] Broad discretion is vested in the District Court in determining the extent of discovery to be allowed under Rule 16(b), and the exercise of that discretion may not be disturbed by the Court of Appeals unless it has been shown that the action of the District Court amounts to a clear abuse of discretion.

The District Court, in ordering a reasonable and limited sampling of the computer lists, subject to appropriate safeguards to prevent the disclosure of unnecessary, personal information, certainly circumscribed Petitioner's request to avoid any possible claim that the request was not "reasonable" within the purview of Rule 16(b). The holding of the Third Circuit, which is in direct conflict with the judicial constructions of the Second, Fourth and District of Columbia Circuits, improperly incorporated in the "reasonableness" requirement of Rule 16(b) a license to balance away the accused's vital constitutional right to discovery of relevant, specified information on the dubious ground of an asserted privilege by a person or persons not now before the Court against a posited invasion of privacy. In so doing, the Court of Appeals departed from settled principles governing the scope of appellate review and merely substituted its own erroneous, insensitive judgment for the sound judgment of the District Court.

The decision below is, moreover, contrary to the well-settled law enunciated by this Court that the Government may not withhold relevant evidence on the basis of an asserted privilege and continue to prosecute a defendant who is denied access to such evidence. The consideration of such extraneous criteria in a criminal case is both con-

6. Of constitutional import are those categories of evidence which this Court has held to be patently and fundamentally discoverable for reason that such evidence would be "material to guilt or innocence." *Brady v. Maryland*, 373 U. S. 83, 87 (1963).

stitutionally impermissible and contrary to well-considered decisions of other Circuits.

IV. Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX "A."

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2294

UNITED STATES OF AMERICA

v.

PETER P. LIEBERT, III,
Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 30, 1975.

MAX ROSENN,
Circuit Judge.

Dated: July 18, 1975

APPENDIX "B."

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2294

UNITED STATES OF AMERICA,
Appellant

v.

PETER P. LIEBERT, III

(D. C. Criminal No. 73-718)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge*, ROSENN and WEIS, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 26, 1974, be, and the same is hereby vacated, and the cause is remanded to the said District Court with directions to reinstate the information. Upon proper motion by the defendant, the District Court should order the Government to produce the materials and experts indicated in the opinion of this Court. Each party will bear its own costs.

ATTEST:
THOMAS F. QUINN
Clerk

June 30, 1975

APPENDIX "C."

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2294

UNITED STATES OF AMERICA,
Appellant

v.

PETER P. LIEBERT, III

Crim. No. 73-718

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 18, 1975

Before SEITZ, *Chief Judge*, ROSENN and WEIS, *Circuit Judges*

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OPINION OF THE COURT

(Filed June 30, 1975)

ROSENN, *Circuit Judge:*

Despite more than a decade of experience with expanded pretrial discovery in criminal cases, the extent to which it should be permitted continues to be "a complex and controversial issue."[1] Whether pretrial discovery may be used to secure extrinsic evidence to impeach the reliability of computer printouts which are the fundament of the prosecution's case presents an issue of first impression.

Defendant, Peter P. Liebert, III, was charged in a three-count information on December 21, 1973, with willfully and knowingly having failed to file his income tax returns for the years 1967 through 1969, in violation of section 7203 of the Internal Revenue Code of 1954 (Code). Liebert was arraigned and pleaded not guilty to the charges. His attorneys have claimed he filed a tax return for each of the three years in question.

I. DISCOVERY MOTIONS

In a failure-to-file prosecution, the Government relies heavily upon a report compiled by the personnel of the appropriate service center that their computers have no record of the receipt of a taxpayer's return for the particular year. In preparation for challenging the reliability and accuracy of the computer report, Liebert filed on January 14, 1974, a motion seeking an order permitting his computer expert access to the Mid-Atlantic Service Center for the purpose of analyzing and testing the Internal Revenue Service's (IRS) data processing system. After extended proceedings, the district court granted the motion.

1. *See Advisory Committee's Note to Proposed Amendments to Rules of Criminal Procedure,* 34 F.R.D. 411, 423 (1964).

On February 28, 1974, Liebert filed a second discovery motion seeking production of all records indicating the number of notices issued by the IRS for the years 1967 through 1973 to taxpayers advising that no tax return had been received.[2] On October 22, 1974, again after extended proceedings, the district court ordered the Government to furnish Liebert a "mutually agreeable portion of the lists" of the people whom the Government suspected as being probable nonfilers for the years 1970 and 1971.[3] 383 F.Supp. 1060 (E.D. Pa. 1974).

When the Government refused to produce the lists, the district court on November 26, 1974, dismissed the charges against Liebert. The Government appeals, arguing that the lists are not subject to disclosure under the Code. The Government also contends that even if the lists are not privileged under the Code, the information Liebert desires through the use of the lists may be obtained from alternative sources without invading the privacy of the persons listed.[4] We find merit in the Government's latter contention, vacate the judgment of the district court, and remand.

An understanding of the nature of the lists in dispute is essential for the proper resolution of the problem confronting

2. Liebert learned of the existence of such records when an Assistant United States Attorney introduced one page of the list into evidence in another failure-to-file case. *See* United States v. Greenlee, No. 74-2106, (3d Cir. May 28, 1975).

3. The lists were not available for 1967 through 1969, the years for which Liebert had been charged with failure to file tax returns. The district court ordered the production of the 1970 and 1971 lists after determining that the system producing these lists had been upgraded since the preparation of the 1967 through 1969 lists. The court reasoned that if errors existed in the later lists, they in all probability would demonstrate the presence of an equal or greater number of errors in the earlier lists. The Govenment has not challenged this conclusion on appeal.

4. Previous to the district court's action, another judge in the district had refused to order the production of the lists. United States v. Spear, 377 F.Supp. 1162 (E.D. Pa. 1974).

us.[5] The lists are prepared in conjunction with the IRS Individual Master File Delinquency Check Program, which identifies individuals who filed in the previous year but apparently have not filed for the current year, and individuals who have not filed for either the current or the previous years.

About six months after the due date of the return in question, an inquiry is initiated by analyzing the individual master file for taxpayers who have filed in the prior year but apparently not for the current year. Also, certain other documents, such as Social Security Administration wage records and W-2 forms, are compared with the master file to identify possible nonfilers. After the potentially delinquent taxpayers have been identified, wage information for the current year, adjusted gross income from the last return filed, and other criteria are used to determine whether the taxpayer probably was required to file.

Within the limitations of available resources, certain of these apparent nonfilers are selected for contact.[6] As soon as the first notices are sent to the apparently delinquent taxpayers, the service center prepares a listing identifying each nonfiling taxpayer. These listings are the lists in issue in this case. If the taxpayer does not respond satisfactorily to the notice, a taxpayer delinquency investigation is issued and forwarded to the local IRS office where an attempt is made to communicate with the taxpayer either by phone, letter, or in person to resolve the apparent delinquency.

Thus, although the lists are commonly referred to as the lists of nonfilers, that appellation is misleading in two aspects. First, the lists contain names of persons who, in fact, have filed. For example, the return may have been in process at

5. Our description is taken from a brief filed by the Government in the district court. Liebert has not disputed the Government's characterization of the lists.

6. In 1970, out of 6,000,000 potential nonfilers, 465,000 were selected for contact.

the time the lists were prepared, the taxpayer may have moved and filed in a different service center, or the taxpayer may have married and filed jointly under a different name. Second, the lists contain names of persons who did not file, but were under no duty to do so. Such people may have not earned enough adjusted gross income to be required to file, or indeed may have died during the year.

II. Government's Statutory Contentions

The Government contends that the production of the lists is barred by section 6103(a) of the Code, which permits the public inspection of returns "only upon order of the President and under rules and regulations prescribed by the Secretary . . . ."[7]

Although recognizing that the nonfiling lists are not tax returns, as are 1040 forms, the Government argues that the lists are compiled from previous years' returns, and from documents normally attached to the current year's returns, such as W-2 forms, and therefore are encompassed within the administrative definition of "return" promulgated under authority of subsection (a).[8]

7. Int. Rev. Code §6103(a) provides:

(a) Public record and inspection.—

(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

8. Returns are defined by Treas. Reg. §301.6103(a)-1(a)(3)(i) (1972) which provides:

(3) *Terms used—(i) Return.* For purposes of section 6103(a), the term "return" includes—

(a) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and

Congress, in enacting section 6103(a), sought to protect the confidentiality of the information necessary for the determination of tax liability found in returns filed under compulsion of law. *Tax Analysts and Advocates v. IRS,* 505 F.2d 350, 354 n.1 (D.C. Cir. 1974); *Association of Am. Railroads v. United States,* 371 F.Supp. 114, 116 (D.D.C. 1974) (three-judge court). This policy of confidentiality encourages the full disclosure of income tax by taxpayers who are assured that their neighbors or competitors "will not be apprised of the intimate details of [their] financial [lives]." *Association of Am. Railroads v. United States, supra,* 371 F. Supp. at 116.

Section 6103(a), however, is limited by section 6103(f) of the Code which mandates that the IRS furnish to an inquirer information as to whether a person has, or has not, filed an income tax return.[9] Information about an individual's financial status necessarily revealed by disclosing whether or not an individual has filed his return cannot be confidential under subsection (a) because the fact of filing or nonfiling is public information under subsection (f). For example, the amount of an individual's adjusted gross income is confidential under subsection (a), but the information that an individual either has an adjusted gross income requiring a filing or lacks such income but desires a tax refund cannot be confidential because such information necessarily is revealed by the filing of a return.

The nonfiling list reveals two types of information about an individual taxpayer. First, the list reveals that as a result of an investigation, albeit preliminary and incomplete, the IRS has determined that the individual did not file a return notwithstanding his duty to file. This type of information is not covered by subsection (a). Second, the list contains limited information about an individual's financial status. Such information reveals at most that an individual either had filed in the previous year or had an adjusted gross income requiring a filing in the current year. This information is exactly the type of information necessarily revealed by the fact of filing, which is public knowledge under subsection (f).

We therefore conclude that neither section 6103(a) nor

8. (Cont'd.)

(b) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (a) of this subdivision.

9. Int. Rev. Code §6103(f) provides:

(f) Disclosure of information as to persons filing income tax returns.—The Secretary or his delegate shall, upon inquiry as to whether any person has filed an income tax return in a designated internal revenue district for a particular taxable year, furnish to the inquirer, in such manner as the Secretary or his delegate may determine, information showing that such person has, or has not, filed an income tax return in such district for such taxable year.

Prior to 1966, subsection (f) required that lists containing the name and address of each person filing a return in a particular internal revenue district should be maintained in each district. The Government argues that the 1966 legislation amending subsection (f) to its present form relegated the disclosure of whether a taxpayer had filed to the provisions of subsection (a).

The 1966 amendment was included in a bill amending the Code to allow for the modernization of the IRS automatic data processing system. Act of Nov. 2, 1966, Pub. L. No. 89-713, 80 Stat. 1107. As a result of this modernization, the IRS proposed to maintain the lists of filers on microfilm, and Congress believed that making the microfilm and the necessary reading equipment available to the general public would not be practical. S. Rep. No. 1625, 89th Cong., 2d Sess. 8 (1966). Congress also noted that under the proposed automatic data processing system, the list of those individuals filing tax returns would contain the individuals' social security numbers. Congress determined that social security numbers should not be available to the general public because these numbers could not be used to obtain information about an individual's wages. *Id.* Subsection (f) was amended to its present form to eliminate these problems.

The legislative history does not reveal any effort to restrict the public nature of information showing that an individual has filed his return. Indeed, the Senate Report accompanying the amendment specifically provided that "whether or not a person has filed his tax return should continue to be a matter of public knowledge." *Id.*

any reasonable construction thereof bars the production of the nonfiling lists pursuant to judicial order. Since the production of the lists is not barred by the statute, production may not be barred by the regulations promulgated under authority of the statute.[10] *See Tax Analysts & Advocates v. IRS, supra,* 505 F.2d at 354 n.1.

The Government also contends that disclosure of the lists is forbidden by section 7213 (a)(1) of the Code which provides that it shall be unlawful for any federal employee "to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law,"[11] and 18 U.S.C. §1905 (1970) which is a more general anti-disclosure

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10. Since we reach this conclusion, we need not determine whether subsection (b) of the Treasury Regulation barring the production of any documents relating to an individual's return is a proper interpretation of the statute. *See* B & C Tire Co. v. IRS, 376 F.Supp. 708, 712 (N.D. Ala. 1974).

We also do not reach the question of whether the regulations promulgated under section 6103 do bar in fact the production of the nonfiling lists pursuant to judicial order. *See* Treas. Reg. §301.6103(a)-1(g) (mandating that returns shall be open for inspection by a United States attorney where necessary in the performance of his official duties); Treas. Reg. §301.6103(a)-1(h) (returns may be furnished to United States attorney for use in, or in preparation for, litigation in any court in which the United States has an interest in the result). *But see* Treas. Reg. §301.6103(a)-1(a)(3)(i) (items listed in subdivision (b) of regulation open to inspection only in discretion of Secretary or Commissioner).

11. Int. Rev. Code §7213(a) (1) provides in pertinent part:

(a) Income returns—

(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law . . . .

statute containing a similar prohibition.[12] Under both statutes, the prohibition against the release of confidential information contains the proviso "except as provided by law." Such phrase permits the disclosure of confidential information pursuant to a lawfully issued judicial order. In *Blair v. Osterlein Machine Co.,* 275 U.S. 220 (1927), the court was confronted with similar language in a predecessor of section 7213(a). The Board of Tax Appeals had issued a subpoena to the Commissioner requesting certain information contained in the tax returns of twelve corporations. The Commissioner maintained that disclosure was forbidden by the statute but the Court disagreed:

> The prohibition is limited to disclosures made "in any other manner that may be provided by law." It cannot be deemed to forbid disclosure made in obedience to process lawfully issued in a judicial or quasi-judicial proceeding . . . .

275 U.S. at 227.

III. Rule 16(b)

Absent any statutory prohibition against the production of nonfiling lists, the authority of the district court to order the production of such lists is governed by Federal Rule of Criminal Procedure 16(b) which provides that "the court may order the attorney for the government to permit the defendant to inspect and copy . . . documents . . . within the possession . . . of the government, upon a showing of materiality to the preparation of his defense and that the request

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12. 18 U.S.C. §1905 (1970) provides in pertinent part:

Whoever, being an officer or employee of the United States or of any department or agency thereof . . . permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined . . . or imprisoned . . . .

is reasonable."[13] The use of the permissive term "may" calls for an exercise of discretion and indicates the absence of a hard and fast rule when discovery should be ordered. *United States v. McCarthy*, 292 F.Supp. 937, 941-42 (S.D.N.Y. 1968). Thus, a district court's ruling on a discovery motion will be disturbed only for an abuse of discretion. *United States v. Fioravanti*, 412 F.2d 407, 410 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).

The nonfiling lists undoubtedly are material to the preparation of Liebert's defense. A defendant in a criminal trial enjoys the sixth amendment right of being confronted with the witnesses testifying against him and of having compulsory process for obtaining witnesses to testify in his favor. As the Supreme Court only recently noted in rejecting a presidential claim of privilege:

> The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Unitd States v. Nixon, 418 U.S. 683, 709 (1974).

13. Federal Rule of Criminal Procedure 16(b) provides:

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

Included within the constitutional right of confrontation is the ability through cross-examination to challenge the credibility and reliability of the witnesses testifying against a defendant. *See Douglas v. Alabama*, 380 U.S. 415, 418 (1964); *Pointer v. Texas*, 380 U.S. 400, 404 (1964). A major "witness" confronting Liebert will be computer printouts indicating that the IRS has no record of having received his returns. *See United States v. Greenlee*, 380 F.Supp. 652 (E.D. Pa. 1974), *aff'd*, No. 74-2106, (3d Cir., May 28, 1975). The introduction of a computer printout is admissible in a criminal trial provided that the party offering the computer information lays a foundation sufficient to warrant a finding that such information is trustworthy and the opposing party is given the same opportunity to inquire into the accuracy of the computer and its input procedures as he has to inquire into the accuracy of written business records. *United States v. DeGeorgia*, 420 F.2d 889 (9th Cir. 1969).

A party seeking to impeach the reliability of computer evidence should have sufficient opportunity to ascertain by pretrial discovery whether both the machine and those who supply it with data input and information have performed their tasks accurately. *See* Manual for Complex Litigation in 1 *J. Moore, Federal Practice*, pt. 2, §2.715 (2d ed. 1974); *United States v. Russo*, 480 F.2d 1228, 1241 (6th Cir. 1973); *United States v. Dioguardi*, 428 F.2d 1033 (2d Cir.), *cert. denied*, 400 U.S. 825 (1970). The nonfiling lists plainly are outputs of the computer system identifying individuals not filing returns. If an individual who in fact has filed is listed as a nonfiler due to computer error, such error casts doubt on the accuracy and reliability of the records identifying Liebert as a nonfiler. The lists, therefore, may be useful to

Liebert in his efforts to impeach the reliability of the computer procedures indicating that he has not filed his returns.

Rule 16(b), however, does not allow discovery merely upon a showing that the requested documents are material to the defendant's preparation for trial; the reasonableness of the discovery request must also be demonstrated. The determination by the district court of the reasonableness of a request requires balancing the interests favoring and opposing discovery. Whether the scales are tipped for or against discovery depends upon where lies the most compelling need. *United States v. Aluminum Co. of America,* 232 F.Supp. 664 (E.D. Pa. 1964).

The interest favoring the discovery request in the instant case is, as just discussed, the usefulness of the nonfiling lists to the preparation of Liebert's defense. Opposing the request are weighty interests—the right of privacy of the individuals named on the lists, and the need to avoid the problems in managing the presentation of evidence developed from the lists.

As aptly described by Mr. Justice Brandeis almost a half century ago, and equally true today, "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The district court characterized this right as "elusive," primarily because it believed the information in the lists could be obtained under section 6103(f) by addressing to the IRS numerous inquiries as to whether particular individuals had filed their returns. 383 F.Supp. at 1064. This characterization, however, disregards the existence of three different facets of individual privacy which may be violated by production of the nonfiling lists, only one of which is infringed to the same degree by subsection (f).

First, the failure of an individual to file a return is revealed by production of the lists. Although an individual

may desire to keep such information confidential, the fact of nonfiling is public information under subsection (f).

Second, the production of such lists necessarily would lead to communications from Liebert. His specific purpose in seeking the list is to communicate with individuals named in the lists in a zealous effort to find inaccuracies. This he proposes to do in the face of "[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality. . . ." *Rowan v. United States Post Office Dep't,* 397 U.S. 728, 737 (1970). While courts in some instances have ordered production of lists which might lead to contacts between the parties obtaining, and those named, in the lists, such production has been limited to instances where it advanced an important public interest and where the person contacted probably would not be offended.[14] Where the contact is likely to prove offensive, the courts vigilantly have safeguarded the privacy of the individual.[15]

An intrusive communication by a stranger about a failure to file a tax return well may prove disturbing to an individual. Moreover, such contact could prove disturbing apart from tax considerations by reviving dormant unpleasant

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14. *See, e.g.,* Robles v. EPA, 484 F.2d 843 (4th Cir. 1973) (names and addresses of persons exposed to radiation emissions, persons seeking information not identified); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971) (names and addresses of persons eligible to vote in representative elections sought by law professors engaged in academic studies).

15. *See, e.g.,* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (right of individuals who object to mailings as "sexually provocative" to have names removed from mailing list); Breard v. Alexandria, 341 U.S. 622 (1951) (protection of individual from uninvited visit of door-to-door solicitor of magazines); Wine Hobby USA, Inc. v. United States Internal Revenue Service, 502 F.2d 133 (3d Cir. 1974) (refusal to order production of lists which would lead to commercial solicitations). *But see* Martin v. Struthers, 319 U.S. 141 (1943) (ordinance forbidding door-to-door solicitation unconstitutional as applied to religious solicitors).

memories.[16] *See Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3445 (Feb. 18, 1975).

Of course, inquiries may be made of individuals about their nonfiling as a result of subsection (f), but the probability of such inquiry is significantly less than through the production of the nonfiling lists. Only 450,000 of the estimated 6,000,000 probable nonfilers are contained in the nonfiling lists, thereby increasing the exposure to contact of the individuals named by a factor of twelve. Moreover, as Liebert recognizes, the identification of all nonfilers under subsection (f) is impractical, requiring culling of names from a phone book or street directory, transmitting the list to the appropriate internal revenue office, and tabulating the answers.[17] As contrasted with this impractical procedure, the easy availability of the names in the nonfiling lists increases the likelihood of contact with such persons.

Third, and most important, the individuals on the nonfiling lists are not just individuals who the IRS believes have not filed, but are individuals who the IRS believes have not filed in violation of their legal obligation. Nothing in subsection (f) authorizes the release of information indicating that the IRS preliminarily suspects an individual of being in violation of the law. Although the great majority of persons on the lists in fact have filed a return or have legitimate reasons for not doing so, being a suspect under investigation by a government agency is a circumstance which every person except the bizarre would prefer to hold in confidence. The courts have respected this preference. *See, e.g., Rose v. Department of the Air Force*, 495 F.2d 261 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3445 (Feb. 18, 1975).

16. For example, Liebert might contact a relative of a person whose name appeared on the list as a probable nonfiler because of the death of that individual.

17. It is uncertain whether Liebert would have to mail each name in a separate envelope or could transmit the entire list at once.

The other interest opposing discovery is the difficulty in managing at trial the information developed from the lists. Liebert hopes to be able to find persons listed as nonfilers but who in fact have filed, and introduce such evidence to the jury either by calling such persons as witnesses or by cross-examination of the IRS computer experts. The Government then may assume the burden of rebutting the accuracy of such evidence by attempting to prove that the persons cited by Liebert did not in fact file their returns or were listed as nonfilers for reasons other than computer error. The trial thus is likely to deteriorate into a series of minitrials centered upon the reasons individuals, not defendants in the case, were listed as nonfilers. The chief issue, Liebert's alleged willful failure to file his returns, may be obscured.

Balancing the need for disclosing all relevant information in a criminal proceeding against the need for protecting the privacy of individuals having no connection with it, and the further need for avoiding the potential misuse of such information is a difficult and delicate task. It may well be, as Liebert contends, that absent alternative sources of information and difficulty in managing such information at trial, "[t]he generalized assertion of privilege [based on confidentiality] must yield to the demonstrated, specific need for evidence in a pending criminal trial." *United States v. Nixon*, 418 U.S. 683, 713 (1974). *See Davis v. Alaska*, 415 U.S. 308 (1974) (juvenile records of witness must be made available to defendant for purposes of cross-examination); *Smith v. Illinois*, 390 U.S. 129 (1968) (witness must reveal his name so as to allow cross-examination); *Dennis v. United States*, 384 U.S. 855 (1966) (grand jury testimony of witnesses must be disclosed to defendant). We note that the foregoing cases required disclosure from witnesses, not extrinsic evidence from unrelated parties. Moreover, such cases do not control here because they involve discovery from the only available source of information. Further the information sought was

either admissible in the case in chief or in a form manageable during cross-examination.

Even when the evidence sought in pretrial discovery is material for the defense of a criminal prosecution, we believe the mantle of the privacy of a person having no connection with the case should not be lifted, at least in the present context, if there are reasonable alternative means of securing the information.[18] The principle has particular application when the intrusion on privacy runs a risk of being extraordinarily burdensome to the parties and also may tend to obscure the real issue in the case.

The Government, both voluntarily and as a result of the district court's order directing that Liebert's experts have access to the Mid-Atlantic Service Center for the purpose of testing and analyzing the computer facilities, represented to the district court that it would make available to Liebert: (a) all the relevant IRS handbooks documenting the procedures, machine operations, and other relevant information pertaining to its electronic data processing system; (b) statistical analyses relating to the Service's ability to discover and report accurately failures to file returns; (c) an expert familiar with all aspects of the nonfiling lists; (d) an expert familiar with all aspects of the processing of work through the Mid-Atlantic Service Center; and (e) an expert who has made studies on the reliability of the Service's data processing sys-

18. *See* ABA Standards Relating To Discovery and Procedure Before Trial §2.5(b) (Approved Draft 1970) which provides:

> (b) The court may deny disclosure authorized by this section if it finds that there is a substantial risk to any person of . . . unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

Judge Weis believes that considerations of unnecessary annoyance or embarrassment set forth in these ABA standards are more applicable to the issue raised in this case than considerations of privacy.

tems.[19] The experts may be deposed by Liebert on any subject not concerning confidential data obtained from tax returns filed by taxpayers. Moreover, the Government has offered to allow Liebert's computer experts to run any test on its computer system not unreasonably interrupting the Service Center operations. Finally, the Government has offered to conduct tests demonstrating the retrieval of a number of actual tax returns of taxpayers whose authorizations are obtained.

Such alternatives should provide Liebert with the information necessary to cross-examine the computer testimony confronting him by analyzing the reliability of the computer system in theory and checking the accuracy of the system in fact. Moreover, the alternatives should provide information focusing directly on the credibility of the computer testimony and more likely should develop the facts than the digression sought by Liebert. They should provide evidence adducible at trial in a more manageable manner without the risk of invading the privacy of, or inconveniencing, taxpayers wholly unconnected with the case. The order of the district court directing the production of the nonfiling lists was unreasonable in light of the alternatives offered by the Government.

The judgment of the district court will be vacated and the case remanded with directions to reinstate the information. Upon proper motion by the defendant, the district court should order the Government to produce the materials and experts indicated in this opinion. Each party will bear its own costs.

19. We assume that the information supplied by the Government will include the number of persons listed as nonfilers due to computer error in 1970 and 1971.

APPENDIX "D."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 73-718

UNITED STATES OF AMERICA

v.

PETER P. LIEBERT, III

Order

AND Now, this 26th day of November 1974, after hearing in open court to show cause why the Information should not be dismissed, and the defendant having been present with counsel, and after hearing opposition from the Government, it is

ORDERED that the Information is hereby dismissed.

BY THE COURT
/s/ JOSEPH S. LORD, III, *Ch. J.*

APPENDIX "E."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 73-718

[Filed October 23, 1974]
UNITED STATES OF AMERICA

v.

PETER P. LIEBERT, III

Order

AND Now, this 23rd day of October, 1974, it is ORDERED that the government's motion for reconsideration be and it hereby is DENIED. The government shall, within two weeks of the entry of this order, furnish to counsel for the defendant a mutually agreeable portion of the lists prepared by the Internal Revenue Service, Philadelphia Service Center, in conjunction with Internal Revenue Service forms 3941 and 4901. The lists so furnished shall not include the Social Security numbers of the persons named therein.

Should counsel fail to agree on the number of names to be supplied to defendant, they shall, within three weeks of the entry of this order, submit proposals to the court for such further action as the court deems appropriate.

BY THE COURT
/s/ JOSEPH S. LORD, III, *Ch. J.*

APPENDIX "F."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 73-718

UNITED STATES OF AMERICA

v.

PETER P. LIEBERT, III

Opinion

JOSEPH S. LORD, III, *Ch. J.* October 22, 1974

Defendant Liebert has been charged with failure to file income tax returns for the years 1967, 1968 and 1969. On February 28, 1974, he filed a motion pursuant to Rule 16(b), Federal Rules of Criminal Procedure, seeking discovery of certain computer lists used in conjunction with Internal Revenue Service forms 3941 and 4901. The motion was granted on May 16, 1974. Subsequently, upon learning that the Commissioner of Internal Revenue had decided that the lists were not discoverable, the government moved for reconsideration, citing non-disclosure statutes and alleging lack of materiality and unreasonableness. For the reasons set out below, I shall deny the government's motion.

I

The lists sought by defendant purport to identify taxpayers who apparently have not filed tax returns for the years 1970 and 1971. He intends to use these lists to locate persons

who actually filed returns for those years, but were nonetheless erroneously listed as non-filers. Defendant claims that the testimony of such persons would "• • • demonstrate • • • that the Internal Revenue Service indices [used to identify non-filers] are totally unreliable." (Defendant's Brief in Opposition to Motion for Reconsideration, p. 9). The government argues that disclosure of the lists is forbidden by provisions of the Internal Revenue Code (26 U.S.C. §§7213(a) and 6103(a), Criminal Code (18 U.S.C. §1905), and Treasury Regulations (§301.6103a, 26 C.F.R. §301.6103a).

Title 26 U.S.C. §7213(a) bars disclosure by federal employees of data set forth in tax returns. Title 18 U.S.C. §1905 is a more general statute which forbids disclosure of any confidential information "coming to [a federal employee] in the course of his employment • • •." Both statutes specifically prohibit examination of "any income return • • • or any book containing any abstract • • • thereof." The government contends that the lists of non-filers are "abstracts prepared from information on tax returns" (Government's Brief in Support of Motion for Reconsideration, at p. 3), and thus fall within the statutory ban.

In light of the fact that defendant seeks neither returns nor information contained on returns, the government's characterization is untenable. However, even if the statutory language were interpreted to encompass the lists, the requested discovery would still be well within the judicial power. Neither 26 U.S.C. §7213(a) nor 18 U.S.C. §1905 raises an absolute prohibition on disclosure. Each statute contains the limiting phrase, "except as provided by law." In *Blair, Commissioner v. Osterlein Machine Company,* 275 U.S. 220 (1927), the Court was faced with similar language in 18 U.S.C. §216, a predecessor of both the above sections. The Commissioner of Internal Revenue had refused to comply with a subpoena, issued by the Board of Tax Appeals, which requested

certain information contained in the tax returns of twelve corporations.[1] The Commissioner asserted that disclosure of such information was forbidden by §216. The Court disagreed:

> "The prohibition is limited to disclosures made 'in any other manner than may be provided by law'. It cannot be deemed to forbid disclosures made in obedience to process lawfully issued in a judicial • • • proceeding • • •." 275 U.S. at 227.

Thus it is clear that the phrase "except as provided by law" contemplates court-ordered disclosure. *See also Frazier v. Phinney*, 24 F.R.D. 406, 409 (S.D. Texas, 1959). The government has not cited, nor am I able to find, any case which holds otherwise.[2]

The Internal Revenue Code §6103 (26 U.S.C. §6103) covers two distinct topics, (1) the publicity of the contents of returns, and (2) the disclosure of whether or not a person has filed a return. The former is dealt with in subsections (a)-(d). Subsection (a), captioned "Public Record and Inspection," is cited by the government as controlling defendant's request. It provides that inspection of tax returns shall be governed by regulations prescribed by the Secretary of the Treasury or his delegate and approved by the President.[3]

1. The case involved a rate determination made by the Commissioner.

2. The government's reliance on *Boske v. Comingore*, 177 U.S. 459 (1900), and *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), is misplaced. Those cases considered only the validity of regulations centralizing the decision-making power (with the Commissioner of Internal Revenue in *Boske* and with the Attorney General in *Touhy*) over whether to disclose documents pursuant to a subpoena duces tecum. As Justice Frankfurter's concurring opinion in *Touhy* makes clear, in neither case did the Court rule on the ultimate reach of that power "to shut off an appropriate judicial demand" for information. 340 U.S. at 472.

3. Treasury Regulations §301.6103a (26 C.F.R. §301.6103a) were adopted and approved pursuant to this authorization.

Without more, the applicability of this subsection and the regulations promulgated under it is at best questionable, since, as stated earlier, defendant does not seek to inspect *tax returns*, but merely to discover *lists of names*. Any doubt, however, is resolved by subsection (f), which deals with the second topic covered by §6103. Before 1966, subsection (f) required that lists containing the name and address of each person who had filed a return in a particular district be maintained for public inspection in that district. In 1966 Congress amended this subsection, eliminating the public lists, and providing that,

> "The Secretary or his delegate shall, upon inquiry as to whether any person has filed an income tax return in a designated internal revenue district for a particular taxable year, furnish to the inquirer, in such manner as the Secretary or his delegate may determine, information showing that such person has, or has not, filed an income tax return in such district for such taxable year."

The government asserts that by substituting the specific inquiry method in place of the lists Congress intended that the lists be kept confidential.

The amendment to subsection (f) was included in a comprehensive Bill (P.L. 89-713) which modernized the I.R.S. automatic data processing system. Senate Report No. 1625, 3 U.S. Code Congressional and Administrative News 3676, 89th Congress, Second Session, 1966, which accompanied the Bill, is revealing. The Report explains that as part of this modernization, the lists of non-filers were no longer to be kept in their original form, but were instead to be put on microfilm. Since making the microfilm and related reading equipment available to the public was felt to be impractical, Congress instituted the specific inquiry procedure. The Report is clear that the Congressional desire for confidentiality was

prompted solely by the fact that the lists contained the Social Security numbers of the persons named.[4]

As to the data sought by defendant, the report is explicit:

> "Your committee agrees with the Committee on Ways and Means, however, that whether or not a person has filed his tax return should continue to be a matter of public knowledge." 3 U.S. Code Congressional and Administrative News at 3683, 89th Congress, Second Session, 1966.

Surely Congress did not intend to authorize the Commissioner of Internal Revenue to bar disclosure of information which Congress had placed in the public domain. Had Congress so intended, 26 U.S.C. §6103(f) would have contained a grant of discretion similar to 26 U.S.C. §6103(a). I therefore conclude that neither the statutes nor the regulation relied on by the government preclude discovery of the lists.[5]

II

Rule 16(b), F.R.Cr.P., states that:

> "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy • • • documents • • • within the possession • • • of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable."

4. Since Social Security numbers could be used to discover wage information, Congress felt that they should not be available to the public. I shall ensure that defendant's discovery satisfies this concern by requiring that Social Security numbers be deleted from any material given to defendant.

5. This conclusion does not imply blanket authorization for private citizens to inspect the lists of non-filers. By amending 26 U.S.C. §6103(f) Congress has clearly foreclosed such inspection on demand. We deal here, however, not with a general request under subsection (f), but rather with a motion pursuant to Rule 16(b), F.R.Cr.P.

The government contends that defendant's discovery motion fails to satisfy the two criteria of materiality and reasonableness imposed by the rule.

The government argues that the lists do not purport to be conclusive lists of persons who have failed to file returns, but serve merely as a starting point in the process of identifying non-filers. Only after further extensive investigation is that process complete. The government argues that by demonstrating the fallibility of the lists, defendant will in no way impugn the accuracy of the entire process. Therefore, the government concludes that discovery of the lists is immaterial to the preparation of Liebert's defense.

This conclusion is short-sighted. Defendant seeks to reveal not merely the inaccuracy of the computer lists, but rather the unreliability of the entire Internal Revenue Service system of weeding out non-filers. The government suggests that there are many reasons why names will appear on the non-filer list that should not be there,—returns in the process of audit, marriage and change of name, death. This is no doubt true. But it may be equally true that some names are on the list simply because the computer makes mistakes. The latter reason could well have a significant bearing on a crucial issue in this case,—the reliability of the entire I.R.S. procedure of identifying non-filers. Nothing short of the discovery sought will reveal the truth. Such necessary discovery satisfies the materiality requirement of Rule 16(b).

The government has also asserted that the lists for 1970 and 1971 are irrelevant to the issue of I.R.S. reliability in this particular case, since defendant is charged with failure to file in 1967, 1968 and 1969. Defendant originally sought the lists for the earlier years, but was told that such records were no longer in existence. Certainly, defendant cannot be held accountable or penalized for the unavailability of the lists for the years of alleged failure to file. And the testimony of the government's own witnesses has established that (1) the

overall I.R.S. system of processing returns has remained unchanged since 1967 (N.T. p. 46, April 25, 1974), and (2) any changes in computer equipment were improvements over the prior art (N.T. pp. 182-184, Jan. 28, 1974, and N.T. pp. 100-101, April 25, 1974). It comes, then, to this: defendant is reduced to seeking to expose inaccuracies in a present overall system unchanged since his alleged delinquencies, but operating with better equipment. His *a fortiori* argument is that if those shortcomings exist now, with better equipment, they had to exist in 1969 without the improved equipment. Circumstances, and not mere chronology, are the touchstone of relevance. The government's claim of irrelevance is without merit.

Finally, the government argues that discovery of the lists would lead to "a gross violation of the privacy of tens of thousands of taxpayers." Urging a special "taxpayers right to privacy,"[6] the government has labeled defendant's request "totally unreasonable." (Government's Brief, pp. 11, 12).

There can be no doubt that confidentiality plays a fundamental role in our process of collecting taxes. The government correctly states that "in view of the antidisclosure statutes, all taxpayers have a reasonable expectation of this right to privacy." (Government's Brief, p. 11). The question, then, is whether disclosure of the specific information sought by Liebert would breach this expectation and thus impair the working of our system of taxation.

6. It is unclear whether the government claims that this taxpayer's right to privacy falls within the scope of the constitutional right to privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its progeny. However, I need not decide this broad question. I hold only that a person's interest in the disclosure of whether or not he has filed a tax return is not a matter of such fundamental importance as "the decision whether to bear or beget a child", *Eisenstadt v. Baird*, 405 U.S. 438 (1972), or "the security of one's privacy against arbitrary intrusion by the police", *Berger v. New York*, 388 U.S. 41 (1967). The government's reliance on these two cases is therefore without merit.

Congress, in amending 26 U.S.C. §6103(f), has clearly answered this question in the negative. As stated earlier, the Secretary of the Treasury or his delegate *must* furnish such information *to anyone* on inquiry.[7] This is in stark contrast to the treatment of other tax information, which Congress has authorized the Secretary to withhold in his discretion, 26 U.S.C. §6103(a). In light of the fact that the Constitution has placed the federal taxing power solely with Congress, I find this legislative guidance highly persuasive, if not compelling.

I am aware that my brother, Judge Newcomer, has recently decided this same issue in favor of the government. U.S. v. SPEAR, 377 F.Supp. 1162 (E.D. Pa. 1974). I share his concern for the privacy of the individuals whose names appear on the lists of non-filers. However, I must balance this concern against not only the Congressional policy cited above, but also the interest of defendant in adequately preparing his defense.

In *Dennis v. United States*, 384 U.S. 855 (1966), the Court, though recognizing " 'the long established policy that maintains the secrecy of grand jury proceedings in the federal courts'," 384 U.S. at 869, citing *U.S. v. Proctor and Gamble Co.*, 356 U.S. 677 (1958), required the government to disclose to defendants grand jury testimony of four government witnesses.[8] The Court recognized "the growing realization that disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice." 384 U.S. at 870.

> "In our adversary system for determining guilt or innocence it is rarely justifiable for the prosecution to have

7. As defendant correctly points out, anyone could compile his own list of apparent non-filers simply by addressing numerous inquiries to the Internal Revenue Service. (Defendant's Brief, p. 6).

8. While production of the grand jury testimony was not sought under Rule 16(b), the Court's comments on disclosure are clearly applicable to the case at bar.

exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." *Dennis v. United States, supra,* 384 U. S. at 873.

I find no such "clear and compelling" countervailing factors in the present case. The right of a citizen to privacy is, of course, an interest that is and should be zealously protected. But so is a citizen's right to his good name. It is the latter interest that defendant here seeks to preserve. When it is considered that the information defendant seeks is public anyway (see discussion, pp. 4-6, *supra*), the asserted invasion of privacy seems, at best, elusive. Defendant's interest, on the other hand, is very real. As between the two, the balance is heavily in favor of disclosure.

The government's motion is denied and discovery of the information sought by defendant will be permitted with the following limitations:

(1) The Social Security numbers of the persons named shall be deleted from the lists given to defendant.

(2) In order to ensure that discovery does not become an interminable process, the lists need not be produced in their entirety. Counsel are instructed to confer in an effort to agree on a sufficient number of randomly chosen names to satisfy defendant's inquiry. Should counsel fail to agree, they should submit proposals to the court. Such agreement or submission of proposals shall not constitute a waiver of the government's disagreement with our decision as to disclosure.

/s/ JOSEPH S. LORD, III, *Ch. J.*

APPENDIX "G."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 73-718

UNITED STATES OF AMERICA

v.

PETER P. LIEBERT, III

Motion To Dismiss

[Filed May 28, 1974]

The defendant Peter P. Liebert, III by his attorneys Marvin Comisky and Robert C. Ozer respectfully moves this Honorable Court to dismiss the information in this case, and in support of the said motion states as follows:

1. On May 16, 1974 this Court entered an Order requiring that certain discovery be granted to the defendant, specifically with respect to records concerning utilization by the Internal Revenue Service-Mid Atlantic Service Center of forms 3941 and 4901 with respect to tax years 1970 and 1971.

2. The said Order entered by this Court on May 16, 1974 required that the said discovery be made available to the defendant on or before May 23, 1974.

3. The United States has failed to comply with the said Order entered by this Court on May 16, 1974, and, on the contrary and in defiance to the authority of this Honorable Court, has informed the Court that the Commissioner of the Internal

Revenue Service has directed that his representatives not provide the discovery ordered by the Court on May 16, 1974.

The failure by the United States to comply with the ORDER entered by this Court on May 16, 1974 denies to the defendant the opportunity to adequately prepare for trial, and prevents counsel for defendant from adequately preparing the trial of this case.

WHEREFORE, defendant prays that the information in this case be dismissed.

MARVIN COMISKY
/s/ ROBERT C. OZER
By: /s/ ROBERT C. OZER
Attorneys for Defendant.

APPENDIX "H."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 73-718

UNITED STATES OF AMERICA

v.

PETER P. LIEBERT, III

Order

AND Now, this 16th day of May, 1974 upon consideration of defendant's Motion for Discovery with respect to utilization of Internal Revenue Service forms 3941 and 4901 it is hereby ORDERED that the United States Attorney will make available to be inspected or copied, to counsel for the defendant or his agents or employees on or before May 23, 1974 all records concerning utilization by the Internal Revenue Service-Mid Atlantic Service Center of forms 3941 and 4901 with respect to tax years 1970 and 1971; the said records to include all indices reflecting the volume and extent of utilization of such forms and the identities of individuals to whom such forms have been mailed.

/s/ JOSEPH S. LORD, III, *Ch. J.*

APPENDIX "I."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 73-718

UNITED STATES OF AMERICA

v.

PETER P. LIEBERT, III

Motion for Discovery

[Filed February 28, 1974]

PETER P. LIEBERT, III, Defendant herein by his attorneys Marvin Comisky and Robert C. Ozer, moves this Honorable Court for an Order pursuant to Federal Rule of Criminal Procedure 16b directing the United States Attorney to permit the defendant to inspect and copy certain books, records and documents as more fully described herein, and in support of said Motion represents to this Court as follows:

1. On or about February 12, 1974, pursuant to local rule 9a counsel for defendant conferred by telephone with Robert N. DeLuca, Esquire, Assistant United States Attorney, and requested that defendant be given access to all records in the possession of the United States disclosing or tending to indicate the volume of written inquiries issued by the Internal Revenue Service to tax payers, which inquiries advise specific tax payers that the Internal Revenue Service has no record that income tax returns for one or more years have been filed.

Although counsel for defendant was unable to specify by form number the inquiry as to which information was requested, counsel for defendant has subsequently identified the official form number of such inquiry as IRS form 3941.

2. Within a few days of the aforesaid inquiry by counsel for defendant to Mr. DeLuca, counsel for defendant was advised by Mr. DeLuca, by telephone, that the United States maintains no records whatsoever which identify or tend to identify the extent of such inquiries; and that the only records kept by the Internal Revenue Service Center are records of the total number of inquiries of all types from all tax payers to the Service Center. Mr. DeLuca explained that this information kept by the Internal Revenue Service does not distinguish the nature of an inquiry from a given tax payer as relating to lost returns, request for refunds, or any other specific inquiry.

3. On Thursday, February 14, 1974, during the trial of United States of America vs. James W. Greenlee, Criminal No. 73-149, in the United District Court for the Eastern District of Pennsylvania, Joseph P. Murphy, Management Analyst, Philadelphia Service Center, Internal Revenue Service, testified that as to tax year 1970 the Mid Atlantic Service Center did in fact maintain records identifying not only the number of form 3149 inquiries sent out for that year, but further particularizing the specific identities of the tax payers to whom such inquiries were issued by the Mid Atlantic Service Center. Mr. Murphy produced one book of four containing such information for that year, one page of which was retained in the public record of the trial, and a copy of which is attached hereto as Exhibit A. It was estimated by Mr. Murphy that the information contained in the four books would reveal that as to tax year 1970 approximately 100,000 inquiries were addressed by means of form 3941 to tax payers in the Philadelphia Metropolitan area advising such tax pay-

ers that the Internal Revenue Service was without record of receipt of tax returns for those tax payers.

4. On February 20, 1974, at the said trial of James W. Greenlee, the defense called as a witness Charles L. Koff whose name appears on the sheet attached hereto as Exhibit A immediately following the name James W. Greenlee, and on that date Charles L. Koff testified that he had in fact never received the inquiry that the Service Center records represented had been issued to him, and that in fact he had filed his income tax return for the year 1970 and had received a refund from the Internal Revenue Service.

5. It is respectfully represented that it is material to the defense to establish that the Internal Revenue Service commits gross errors with respect to allegations of non-filing, and that the electronic data processing system that constitutes the Internal Revenue Service records in this regard is unreliable and produces false information. In support of this proposition, it is material to the defense to obtain access to all records in the possession of the United States that establish or tend to indicate the volume and extent of inquiries utilizing form 3941 and the successor form 4901 with respect to tax years 1967, 1968, 1969, 1970, 1971, 1972, and 1973.

6. Access to the information requested herein is not unreasonable and will present no difficulty to the United States, as evidenced by the fact that such information relating to tax year 1970 was made readily available at the public trial specified herein.

WHEREFORE Defendant respectfully urges this Court to issue an Order pursuant to Federal Rule of Criminal Procedure 16b directing the United States Attorney to make available to counsel for the Defendant all records of the Internal Revenue Service which reveal or tend to indicate the

extent and specifics of inquiries by means of form 3941 and any successor forms specifically including form 4901 relating to tax years 1967, 1968, 1969, 1970, 1971, 1972, and 1973.

MARVIN COMISKY,
ROBERT C. OZER,
By: /s/ ROBERT C. OZER
Attorneys for Defendant

Of Counsel:
BLANK, ROME, KLAUS & COMISKY

APPENDIX "J."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Information No. 73-718
Wilfull Failure to File Federal Income Tax Returns
Filed: Dec. 21, 1973

UNITED STATES OF AMERICA

v.

PETER P. LIEBERT, III.

Information

COUNT I

THE UNITED STATES ATTORNEY CHARGES:

That during the calendar year 1967, the defendant, PETER P. LIEBERT, III, who was a resident of the City of Philadelphia, State of Pennsylvania, had and received a gross income of $67,117.00; that by reason of such income he was required by law, following the close of the calendar year 1967 and on or before April 15, 1968, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Philadelphia, at Philadelphia in the Eastern District of Pennsylvania, or to the Director, Internal Revenue Service Center, Mid Atlantic Region, Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the

foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of 26 United States Code Section 7203.

COUNT II

THE UNITED STATES ATTORNEY FURTHER CHARGES:

That during the calendar year 1968, the defendant, PETER P. LIEBERT, III, who was a resident of the City of Philadelphia, State of Pennsylvania, had and received a gross income of $58,491.00; that by reason of such income he was required by law, following the close of the calendar year 1968 and on or before April 15, 1969, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Philadelphia, at Philadelphia in the Eastern District of Pennsylvania, or to the Director, Internal Revenue Service Center, Mid Atlantic Region, Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of 26 United States Code Section 7203.

COUNT III

THE UNITED STATES ATTORNEY FURTHER CHARGES:

That during the calendar year 1969, the defendant, PETER P. LIEBERT, III, who was a resident of the City of Philadelphia, State of Pennsylvania, had and received a gross income of $60,796.00; that by reason of such income he was required

by law, following the close of the calendar year 1969 and on or before April 15, 1970, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Philadelphia, at Philadelphia in the Eastern District of Pennsylvania, or to the Director, Internal Revenue Service Center, Mid Atlantic Region, Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of 26 United States Code Section 7203.

/s/ ROBERT E. J. CURRAN
United States Attorney

APPENDIX "K."

Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 16(b) of the Federal Rules of Criminal Procedure.

RULE 16.
DISCOVERY AND INSPECTION

(*b*) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the

defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

5 U.S.C. § 552.

§ 552. *Public information, agency rules, opinions, orders, records, and proceedings*

(b) This section does apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(c) This section does not authorize withholding of information or limit the availability of records to the

public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

26 U.S.C. § 6103(a).

(a) PUBLIC RECORD AND INSPECTION.—

(1) Return made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

(2) All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, subchapter B of chapter 37, and chapter 41 shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person, a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Secretary or his delegate. The Secretary or his delegate may prescribe a reasonable fee for furnishing such copy.

26 U.S.C. § 6103(f), as amended November 2, 1966, provides:

(f) DISCLOSURE OF INFORMATION AS TO PERSONS FILING INCOME TAX RETURNS.—The Secretary or his delegate shall, upon inquiry as to whether any person has filed an income tax return in a designated internal rev-

enue district for a particular taxable year, furnish to the inquirer, in such manner as the Secretary or his delegate may determine, information showing that such person has, or has not, filed an income tax return in such district for such taxable year.

Prior to the amendment, this Section stated:

"(f) Inspection of List of Taxpayers—The Secretary or his delegate shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the principal revenue officer for the internal revenue district in which the return was filed, and in such other places as he may determine, lists containing the name and the post-office address of each person making an income tax return in such district."

26 C.F.R. 301.6103(a)3(i)(a) and (b), promulgated in connection with 26 U.S.C. 6103(a), read as follows:

(*3*) Terms used—(i) *Return.* For purposes of section 6103(a), the term "return" includes—

(*a*) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and

(*b*) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (*a*) of this subdivision. The items listed in (*b*) of this subdivision may be open to inspection in any case where inspection of the return is authorized

by section 6103 (a) and these regulations only in the discretion of the Secretary or the Commissioner or the delegate of either. The above rules and procedures also apply to any reproductions or recordings by whatever means made of any such documents or portion thereof. A notice of acquisition filed under section 4917 is a return for purposes of section 6103. An application for exemption from income tax under section 501 (a) filed by an organization described in section 501(c) or (d) in order to establish its exemption is not a return for purposes of section 6103.

Supreme Court, U. S.
FILED
NOV 5 1975
MICHAEL RODAK, JR., CLERK

No. 75-157

In the Supreme Court of the United States

OCTOBER TERM, 1975

PETER P. LIEBERT, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

ROBERT E. LINDSAY,
Attorney,
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Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	12

CITATIONS

Cases:

Davis v. *Alaska*, 415 U.S. 308	7
Dennis v. *United States*, 384 U.S. 855	7
DeVita v. *Sills*, 422 F. 2d 1172	6
Getman v. *National Labor Relations Board*, 450 F. 2d 670	10, 11
Jencks v. *United States*, 353 U.S. 657	7
Pointer v. *Texas*, 380 U.S. 400	7
Robles v. *Environmental Protection Agency*, 484 F. 2d 843	10
Roviaro v. *United States*, 353 U.S. 53	7
United States v. *Andolschek*, 142 F. 2d 503	7
United States v. *Coplon*, 185 F. 2d 629	7
United States v. *Gamboa*, 483 F. 2d 427	7
United States v. *Greenlee*, 380 F. Supp. 652, affirmed, No. 74-2106, C.A. 3, decided May 28, 1975, petition for a writ of certiorari pending, No. 75-151	4, 11
United States v. *Nixon*, 418 U.S. 683	7
United States v. *Reynolds*, 345 U.S. 1	7

Statutes: Page

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6103 5
Section 6103(f) 8
Section 7203 2

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 16(b) 6, 8, 10

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 383 F. Supp. 1060. The court of appeals' opinion is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1975. The petition for a writ of certiorari was filed on July 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner was not entitled to discovery of copies of lists prepared by the Internal Revenue Service containing the names of probable nonfilers of tax returns, in connection with his defense against a charge of failure to file tax returns.

STATEMENT

On December 21, 1973, petitioner was charged with willful failure to file income tax returns for the years 1967 through 1969, in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. (Pet. App. A4). The district court dismissed the information because of the government's failure to comply with a discovery order that directed the production of a list of names and addresses of individuals whom the Internal Revenue Service had selected for investigation as probable nonfilers of tax returns during the years 1970 and 1971 (Pet. App. A20). The court of appeals reversed and ordered the information against petitioner reinstated (Pet. App. A3-A19). The sole question presented by the petition is whether petitioner is entitled to discovery of the Internal Revenue Service's list of probable nonfilers.

The circumstances concerning the district court's dismissal of the information are as follows: Shortly after pleading not guilty, petitioner moved in the district court (R. 8-9)[1] for an order permitting his

[1] "R." and 'Supp. R." references are to the separately bound record appendices in the court of appeals.

experts to have access to all computers and computer programs at the Mid-Atlantic Service Center of the Internal Revenue Service, for a period not to exceed three weeks, for the purposes of analyzing the reliability of any report by those computers that petitioner had failed to file income tax returns for the years 1967, 1968, and 1969. In support of this motion, petitioner asserted that he had filed income tax returns for the years in question (R. 8). The only evidence he offered in support of his assertion that he filed income tax returns was indirect. The investigating Internal Revenue agent testified that petitioner told him that he had filed returns for the years at issue (R. 193) and that all records that would corroborate the fact that he had filed had been lost (R. 194). However, petitioner did not testify, submit any affidavits, or produce any records (*i.e.*, cancelled checks or retained copies of income tax returns) in support of his claim, despite the fact that the government offered to dismiss the information upon petitioner's production of his allegedly filed tax returns and/or cancelled checks establishing payments of the tax liabilities for the years at issue (see R. 13).

At an ensuing hearing, petitioner presented an expert who testified that, if the discovery motion were granted, he would be able to analyze and evaluate the reliability of the system being used by the Internal Revenue Service to discover nonfilers of tax returns (R. 128-129). After additional hearings and arguments, an order was entered on October 23, 1974,

granting petitioner's request for access to the Mid-Atlantic Service Center for the purpose of analyzing and testing the Internal Revenue Service's electronic data processing system (R. 2; Supp. R. 1-6).[2]

On February 28, 1974, petitioner filed a second discovery motion (R. 40-43) in which he sought production of all records indicating the number of notices issued by the Internal Revenue Service for the years 1967 through 1973 to taxpayers advising them that their tax returns had not been received and requesting an explanation of their failure to file.[3] The government opposed the motion, arguing, *inter alia*, that disclosure of the requested lists "would involve a gross violation of the privacy" of the persons whose names appeared on the lists (R. 469). Although it opposed petitioner's motion, the government indicated that it was willing to produce for examination the Internal Revenue Service employee who had developed the lists and was responsible for their maintenance and use (R. 471-477, 481-484).

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[2] The Internal Revenue Service agreed to comply with this order and began to implement it.

[3] Petitioner learned of the existence of such lists when an Assistant United States Attorney introduced one page of such a list into evidence in another case involving a failure to file income tax returns (*United States* v. *Greenlee*, 380 F. Supp. 652 (E.D. Pa.), affirmed, No. 74-2106, C.A. 3, decided May 28, 1975, petition for a writ of certiorari pending, No. 75-151). The defense in *Greenlee* presented a witness who testified that, despite the fact that his name appeared on the list, he had never received the notice which the list indicated had been issued to him and that he had in fact filed his income tax return for the year at issue.

On October 22, 1974, the district court ordered the government to furnish petitioner a "mutually agreeable portion of the lists" (R. 496). The court concluded that petitioner's interest in the adequate preparation of his defense outweighed any invasion of privacy that might be suffered as the result of production by those whose names appeared on the lists (Pet. App. A26-A30). After being informed that the Commissioner of Internal Revenue had determined that the lists should not be produced, the district court dismissed the information (R. 502, 504-507).

The court of appeals reversed and remanded the case to the district court with directions to reinstate the information against petitioner. It held that while the lists were material to the preparation of petitioner's defense, the privacy interest of those persons whose names appeared on the list was weighty (Pet. App. A14-A16). In the court's view, this privacy interest, coupled with the fact that production of the lists posed significant problems of managing the evidence at trial and the possibility that the trial would deteriorate into a series of minitrials (Pet. App. A17-A19), outweighed petitioner's need for these lists.[4]

---

[4] The court of appeals rejected the government's argument that disclosure of the lists was barred by Section 6103 (Pet. App. A7-A11). While we believe that the disclosure of the names of persons suspected by the Internal Revenue Service not to have filed tax returns is barred by that statutory provision, we confine our discussion here to the privacy interest ground upon which the court of appeals rested its decision.

ARGUMENT

1. The court of appeals correctly concluded that petitioner, charged with failure to file income tax returns, could not discover lists of persons suspected by the Internal Revenue Service of not filing income tax returns. He sought this information in order to prove the inaccuracy of those lists as part of his defense. However, petitioner has never accepted the government's offer to dismiss the charges against him upon his production of documentary evidence (which would presumably be in his possession) that he filed the returns in question. Thus, the decision below properly rejected petitioner's attempt to convert his trial for failure to file income returns into an inquiry as to whether other persons, who are not parties to the case, had not filed returns.

Petitioner argues (Pet. 15-22) that the decision of the court of appeals deprived him of due process of law and of his right to confront and cross-examine the witnesses against him. However, the right of discovery in a criminal case does not include the right to production of any and all information which may be useful to the defense. See *DeVita* v. *Sills*, 422 F.2d 1172, 1181 (C.A. 3). Indeed, Rule 16(b) of the Federal Rules of Criminal Procedure itself requires "a showing of materiality to the preparation of * * * [the] defense and that the request is reasonable."

The decision of the court of appeals will not deny petitioner's rights in the conduct of his defense. The

purpose of petitioner's discovery request was to impeach the reliability of computer evidence. But as the court of appeals noted (Pet. App. A18-A19), there were alternative means of securing the information that petitioner sought. Thus, a refusal to produce the lists would not deny due process of law or the petitioner's right to confront the witnesses against him, since the lack of access to the lists would not preclude petitioner from impeaching the reliability of the computer evidence. As the court of appeals noted (Pet. App. A17), the cases upon which petitioner relies (Pet. 15-16, 20-21)[5] "do not control here because they involve discovery from the only available source of information." Here, the availability of alternative means for discovering the information sought makes it impossible to conclude that the decision holding that the lists should not be produced denied petitioner the right adequately to prepare his defense. See *United States* v. *Gamboa*, 483 F.2d 427, 428 (C.A. 9).

Contrary to petitioner's assertion (Pet. 26), the court of appeals did not "balance away the accused's * * * right to discovery of relevant, specified information." To the contrary, the court balanced petitioner's interest in production against the privacy interests of those whose names appeared on the lists.

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[5] *Roviaro* v. *United States*, 353 U.S. 53; *Jencks* v. *United States*, 353 U.S. 657; *United States* v. *Reynolds*, 345 U.S. 1; *Davis* v. *Alaska*, 415 U.S. 308; *Pointer* v. *Texas*, 380 U.S. 400; *United States* v. *Nixon*, 418 U.S. 683; *Dennis* v. *United States*, 384 U.S. 855; *United States* v. *Coplon*, 185 F. 2d 629 (C.A. 2); *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2).

Since alternative means were available for petitioner to test the reliability of the computer lists, the decision below correctly concluded that the need for protecting the privacy of individuals having no connection with the trial outweighed petitioner's interest in obtaining the lists. Under these circumstances, the decision did not deprive petitioner of his rights to due process or to confront the witnesses against him.

2. Despite the careful balancing of the interests by the court of appeals, petitioner contends (Pet. 23-26) that it erred in concluding that the district court abused its discretion under Rule 16(b) of the Federal Rules of Criminal Procedure in ordering the discovery requested. In petitioner's view, the privacy interest of those whose names appear on the lists is "minor and elusive" (Pet. 18), and the alternative discovery available is inadequate because it is "a hollow substitute" for the information which he sought (Pet. 24, n. 5).

Under the "reasonableness" standard of Rule 16 (b), petitioner was not entitled to request lists of names and addresses of people whom the Internal Revenue Service suspected were required to file tax returns and has selected for investigation as probable nonfilers.[6] As the court of appeals noted (Pet. App.

[6] Petitioner further argues (Pet. 21 n. 4, 23) that the identity of those who have not filed tax returns is public information under Section 6103(f) of the Internal Revenue Code of 1954. But that section merely requires the government, in response to a request, to furnish information showing whether a particular person has or has not filed an income tax return for a particular year. There is a vast difference between an inquiry as to whether a particular person has or has not filed a tax return for a particular year and a request for a list of those persons who have been identified as probable nonfilers of tax returns.

A15-A16), "being a suspect under investigation by a government agency is a circumstance which every person except the bizarre would prefer to hold in confidence," and contact "by a stranger [*i.e.*, petitioner] about a failure to file a tax return well may prove disturbing to an individual" whose name appears on the list. Thus, the court correctly concluded that the privacy interest of the persons whose names appear on these lists, strangers to this litigation, was "weighty" (Pet. App. A14).

Moreover, apart from the fact that the government offered petitioner an alternative means of challenging the accuracy of its nonfiler lists,[7] it also offered to conduct tests demonstrating the retrieval of a number of actual tax returns of taxpayers whose authorizations had been obtained (Pet. App. A19). The court

[7] The government offered to make available to petitioner: (1) all the relevant Internal Revenue Service handbooks documenting the procedures, machine operations, and other relevant information pertaining to its electronic data processing system; (2) statistical analysis relating to the Service's ability to discover and report accurately failures to file returns; (3) an expert familiar with all aspects of the nonfiling lists; (4) an expert familiar with all aspects of the processing of work through the Mid-Atlantic Service Center; and (5) an expert who had made studies on the reliability of the Service's data processing system (Pet. App. A18-A19). The government also offered to allow petitioner's computer experts to run any test on its computer system not unreasonably interrupting the Service Center's operations (Pet. App. A19).

of appeals also required that the government supply information as to the number of persons whose names appeared on the lists as nonfilers due to computer error (Pet. App. A19, n. 19). In view of the availability of such alternative discovery, the court of appeals correctly concluded that petitioner's request would unreasonably invade the privacy interests of innocent persons.[8]

3. Contrary to petitioner's argument (Pet. 24-25), the decision below does not conflict with *Robles* v. *Environmental Protection Agency*, 484 F.2d 843 (C.A. 4), and *Getman* v. *National Labor Relations Board*, 450 F.2d 670 (C.A.D.C.). Those cases both involved requests for information under the Freedom of Information Act, 5 U.S.C. 552, where the courts rejected the claim that the information sought was exempt from disclosure under Section 552(b)(6) as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Apart from the fact that the standards for disclosure under the Freedom of Information Act are different than those under Rule 16(b) of the Federal Rules of Criminal Procedure, the cases are distinguishable.

[8] The court of appeals also noted that since petitioner sought to use the lists to locate persons he could call to testify that they had filed despite the fact that they were listed as nonfilers, the discovery sought could lead to "a series of mini-trials centered upon the reasons individuals, not defendants in the case, were listed as nonfilers" (Pet. App. A17) and thereby obscure the issue whether petitioner filed income tax returns for the years at issue.

In *Robles*, the disclosure of the results of a survey of the radiation levels in homes and public structures where uranium tailings had been used for construction fill was held not to constitute "a clearly unwarranted invasion of personal privacy" because the information had already been given to the Colorado Department of Health, which had made the results of the survey available on request. Indeed, the court noted that the record indicated that no householder had objected to this disclosure (484 F.2d at 846). Here, however, the lists sought by petitioner are not made available by the Internal Revenue Service on request.[9] In *Getman*, the court held that disclosure of a list of names and addresses of employees eligible to vote in certain labor representation elections was not a clearly unwarranted invasion of personal privacy. In so concluding, the court noted its belief that any invasion of privacy was "minor," because "in themselves a bare name and address give no information about an individual which is embarrassing" (450 F.2d at 675). Unlike *Getman*, the disclosure in this case would reveal much more than simply a name and address, but whether the Internal Revenue Service believes that the named persons have not filed tax returns and has selected them for investigation.

[9] Petitioner offers no support for his assertion that "the Government routinely uses computer lists of non-filers as affirmative evidence of guilt in failure-to-file cases" (Pet. 22). Although one page from such a list was introduced into evidence by the government in *United States* v. *Greenlee*, *supra*, the use of one page of such a list in one case hardly establishes routine use of such lists in failure-to-file cases.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

ROBERT E. LINDSAY,
Attorney.

NOVEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 595981 92